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Résumé de l'article

Cet article se penche sur la nature du développement de la common law, comme l'illustre le recent arrêt sur le droit à la vie privée *Jones v. Tsige*. L'auteur se concentre sur *Jones*, où la Cour d'appel de l'Ontario a reconnu un nouveau délit d'« intrusion dans l'intimité ». En s'appuyant sur une analyse détaillée de l'arrêt, l'article explore des enjeux qui ont une importance beaucoup plus large sur le développement judiciaire du droit à la vie privée, à savoir le processus d'élaboration progressive de la loi, les impulsions morales qui y sont à l'oeuvre et l'importance qu'a l'imagination pour ses opérations. En soulevant ces enjeux distincts et en analysant leur rôle dans *Jones*, cette étude propose un cadre permettant d'examiner ces questions lors des affaires portant sur le droit à la vie privée qui pourront se présenter. En outre, l'article soutient que l'arrêt *Jones* clarifie l'analyse du processus du développement de la common law. Il contclut notamment que le nouveau délit sur le droit à la vie privée reconnu dans *Jones* est le résultat d'un développement légitime progressif plutôt qu'un cas d'activisme judiciaire injustifié.

PRIVACY, CORRECTIVE JUSTICE, AND INCREMENTALISM: LEGAL IMAGINATION AND THE RECOGNITION OF A PRIVACY TORT IN ONTARIO

Thomas DC Bennett[*]

This article considers the nature of common law development as exemplified by the recent privacy case of *Jones v. Tsige*. The author focuses on *Jones*, in which the Ontario Court of Appeal recognized the novel privacy tort of "intrusion upon seclusion". Using a detailed analysis of the case as its basis, the article explores issues which have much wider significance for the judicial development of privacy laws: the process of incremental elaboration of the law, the moral impulses at work within it, and the relevance of imagination to its operations. By drawing out these discrete issues and analyzing the role that each plays in *Jones*, the article offers a framework for examining such questions in future privacy cases. Moreover, this article argues that the judgment in *Jones* brings valuable clarity to the analysis of the process of common law development. In particular, the essay concludes that the novel privacy tort recognized in *Jones* is the result of a legitimate incremental development rather than an instance of undue judicial activism.

Cet article se penche sur la nature du développement de la common law, comme l'illustre le recent arrêt sur le droit à la vie privée *Jones v. Tsige*. L'auteur se concentre sur *Jones*, où la Cour d'appel de l'Ontario a reconnu un nouveau délit d'« intrusion dans l'intimité ». En s'appuyant sur une analyse détaillée de l'arrêt, l'article explore des enjeux qui ont une importance beaucoup plus large sur le développement judiciaire du droit à la vie privée, à savoir le processus d'élaboration progressive de la loi, les impulsions morales qui y sont à l'oeuvre et l'importance qu'a l'imagination pour ses opérations. En soulevant ces enjeux distincts et en analysant leur rôle dans *Jones*, cette étude propose un cadre permettant d'examiner ces questions lors des affaires portant sur le droit à la vie privée qui pourront se présenter. En outre, l'article soutient que l'arrêt *Jones* clarifie l'analyse du processus du développement de la common law. Il contclut notamment que le nouveau délit sur le droit à la vie privée reconnu dans *Jones* est le résultat d'un développement légitime progressif plutôt qu'un cas d'activisme judiciaire injustifié.

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Introduction

Elaboration of the law relating to invasion of privacy has been proceeding apace in the common law world in recent years (for example, in England and in New Zealand). As such, we might see recent development in this area of the law in Canada as an instance of playing catch-up. Such a view would, however, be wide of the mark. For when I scrutinize the recent Canadian case of *Jones v. Tsige*,[1] I find that it brings into focus issues that require more judicial and academic work across the common law world (and indeed beyond). These issues are the process of judicial elaboration of the law ("incrementalism" to common lawyers), the moral impulses at work in the law, and the relevance of imagination to its operations. I will examine each of these matters in detail below. And, at the conclusion of this essay, I will use them to point up a contrasting tendency for judges and, in particular, the English academic community to get bogged down in matters of technical detail and to lose sight of these large issues that invest this branch of the law with politico-legal significance.

Jones is particularly worthy of study because it represents a significant incremental step for the common law: the recognition of a novel head of tortious liability. That this has taken place in order to secure protection for a controversial interest, privacy, only adds to the case's importance.

By way of comparison, in England a (more limited, information-focused) tort[2] of "misuse of private information"[3] has been recognized in recent years, and the broad academic consensus is that this English tort is the result of the incremental development of the older equitable doctrine of confidence.[4] The "intrusion upon seclusion" tort recognized in *Jones*,

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1 2012 ONCA 32, 108 OR (3d) 241 [*Jones*].

2 There is still some debate as to the precise nature of the new English cause of action. Some commentators label it tortious (see Harvey McGregor, *McGregor on Damages*, 18th ed (London: Sweet & Maxwell, 2009) at 42-002), while others consider it to be essentially equitable (see Anthony M Dugdale, Michael A Jones & Mark Simpson, eds, *Clerk & Lindsell on Torts*, 19th ed (London: Sweet & Maxwell, 2006) at 28-01–28-03). The English High Court judge Eady J has, extra-judicially, expressed the opinion that "misuse of private information" might be neither tortious nor equitable, but instead a "new creature deriving from the [European Court of Human Rights at] Strasbourg['s] way of doing things" (Mr Justice Eady, "Launch of New 'Centre for Law, Justice & Journalism'" (public lecture delivered at City University, London, United Kingdom, 10 March 2010), [unpublished]).

3 *Campbell v MGN Ltd*, [2004] UKHL 22 at para 14, [2004] 2 AC 457, Nicholls LJ.

4 See Gavin Phillipson, "Privacy: The Development of Breach of Confidence: The Clearest Case of Horizontal Effect?" in David Hoffman, ed, *The Impact of the UK Human Rights Act on Private Law*, (Cambridge: Cambridge University Press, 2011) 136 [Phillipson, "Privacy"]; Murray Hunt, "The 'Horizontal Effect' of the Human Rights Act" (1998) PL 423.

however, has developed very differently; it has not evolved from a pre-existing cause of action. Key to this is the fact that in *Jones*, Justice Robert J. Sharpe (who gives the lead judgment) makes an appeal to "*Charter* values" as a justification for extending the scope of tortious liability to cover intrusions upon the plaintiff's privacy. Broadly speaking, this idea bears significant similarity to the notion of "indirect horizontality"[5] under the *Human Rights Act* in the U.K.[6] But *Jones* is not simply a matter of the indirect horizontal application of the *Canadian Charter of Rights and Freedoms*;[7] that horizontality is supplemented by an appeal to another overarching principle which underpins tort law itself: corrective justice. I will explore the role that corrective justice plays in the judgment and will

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5 A piece of higher-order public law (such as an international treaty) has "horizontal effect" if it may be relied upon by one private party in order to found a claim against another private party for breach of the higher-order law. (This is distinguishable from pieces of higher-order public law that are merely "vertically effective" and can be relied on by a private party only to found a claim against the state.) It has been pointed out that the *Human Rights Act 1998* ((UK), 1998, c 42 [*HRA*]), which incorporates the rights enshrined in the *European Convention on Human Rights* (*Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 222, Eur TS 5 [*ECHR*]) into domestic UK law, only expressly provides for vertical effect (see Richard Buxton, "The Human Rights Act and Private Law" (2000) 116 Law Q Rev 48; Hunt, *supra* note 4). However, the judiciary has interpreted the statute as having some horizontal application. Two broad models of this horizontality—"direct" and "indirect"—emerged in academic literature in the early 2000s before it became clear how the judiciary would apply the *HRA*. The "direct" model, whereby private parties would be able to use the *HRA* as a basis for private claims directly (that is, as if it created statutory torts for breaches of *ECHR* rights), proposed by William Wade (see HWR Wade, "Horizons of Horizontality" (2000) 116 Law Q Rev 217) and Nicole Moreham (see NA Moreham, "Privacy and Horizontality: Relegating the Common Law" (2007) 123 Law Q Rev 373 [Moreham, "Privacy and Horizontality"]), has not been adopted by the courts (see Phillipson, "Privacy", *supra* note 4 at 144), despite some initial signs that it might be (see e.g. Kirsty Hughes, "Horizontal Privacy" (2009) 125 Law Q Rev 244). Under the "indirect" model, courts (bound as public bodies to act in a manner compatible with *ECHR* rights) develop private law in order to provide remedies for breaches of *ECHR* rights by private parties (see Alison L Young, "Mapping Horizontal Effect" in Hoffman, *supra* note 4, 16; Gavin Phillipson & Alexander Williams, "Horizontal Effect and the Constitutional Constraint" (2011) 74:6 Mod L Rev 878). This model is labeled "indirect" because private law, rather than reliance upon the *ECHR* itself, is the mechanism by which rights violations become actionable. This "indirect" model is the one that courts have embraced (see Phillipson, "Privacy", *supra* note 4. See also Patrick O'Callaghan, *Refining Privacy in Tort Law* (Springer: Heidelberg, 2013) at 153 [O'Callaghan, *Refining Privacy*]).

6 For a comprehensive taxonomy of the various models of horizontal effect proposed by academics and the judiciary to explain the manner in which the *HRA* (*supra* note 5) makes the *ECHR* (*supra* note 5) applicable in domestic private law, see Young, *supra* note 5.

7 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

also seek to contribute to a wider academic debate on the position that this concept occupies in tort law more generally.

We will see in Justice Sharpe's judgment in *Jones* a particular imaginative process that can be analyzed by reference to a notion of "legal imagination". Justice Sharpe's exercise of the "legal imagination" leads him to identify and make use of a particular incremental method to achieve the development he seeks. We will see that he appeals to an established principle underpinning tort law generally: its "protective purpose".[8] I will also note the limits of the (Canadian legal) system in which Justice Sharpe is exercising imagination and delineate the edges of the "space" within which he is operating.[9] Justice Sharpe recognizes that, in order to deflect the most vehement criticism that might be levelled against his judgment, he must point to at least some doctrinal evidence that tort law may protect against intrusions upon privacy. It is noteworthy in this respect that he states that the court has "recognized" rather than created the new tort.[10] Moreover, his assertion that the court should develop the common law in accordance with *Charter* values pays heed to the notion that higher-order constitutional principles ought to be reflected in burgeoning tortious development while recognizing that the limits of this are to be set by higher courts (in this instance, the Supreme Court of Canada). Finally, I will consider the incremental nature of the development which Justice Sharpe pursues and, ultimately, achieves.

The essay concludes that this development of tort law may properly be classed as an incremental step since it fits two academically-recognized and judicially-accepted models of incrementalism.[11] As such, I will demonstrate how Justice Sharpe's judgment in *Jones* may be defended against accusations that he has stepped beyond the role of the courts and intruded into the realm of the legislature.

It is also worth mentioning at the outset one aspect of the case with which this paper is not concerned. This is the measure of damages that the court ultimately awarded the plaintiff in *Jones* and the method by which Justice Sharpe came to his decision on quantum. While it is doubt-

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8 See Lesley Dolding & Richard Mullender, "Tort Law, Incrementalism, and the House of Lords" (1996) 47:1 N Ir Legal Q 12.

9 Richard Mullender, "Judging and Jurisprudence in the USA" (2012) 75:5 Mod L Rev 914 at 922 [Mullender, "Judging"].

10 *Jones*, *supra* note 1 at para 65.

11 The term "incrementalism" is used in this essay to describe a genus of common law judicial methodology whereby novel legal rules, which are pre-conditioned (to a greater or lesser extent) by existing rules, principles, and values, are recognized, thus making it possible for courts to drive legal development. See Subsection I.D.4., below ("Incrementalism").

less an important aspect of the case in its own right, this essay does not intend to engage with it. The reason for this is that the essay focuses on the way in which *liability* may be established for a novel tort, as opposed to discussing the remedies that may then become available.

As a starting point, it is worth briefly setting *Jones* within its wider context as part of an emerging global common law trend toward advancing legal protection for privacy interests.

I. A Global Privacy Context

Privacy has long proven a difficult interest for which to provide effective legal protection. But, in recent years, the common law has been rising to the challenge across the world. The United States is often cited as the starting point for privacy torts. The United States has had four distinct privacy torts for around half a century: intrusion upon a plaintiff's seclusion,[12] public disclosure of private facts,[13] placing a plaintiff in false light in the public eye,[14] and appropriation of a plaintiff's name or likeness for gain.[15] The establishment of these four torts in the *Second Restatement of Torts*[16] was the fruit of the labours of William Prosser, who compiled a taxonomy of privacy interests that had been protected in a range of cases across the United States in preceding years.[17] The tort of intrusion upon seclusion has its roots in Warren and Brandeis' seminal article, "The Right to Privacy", where the authors argued that "the right to be let alone" should find legal protection through the medium of tort law.[18] This tort includes "listening or looking, with or without mechanical aids, into the plaintiff's private affairs ... 'even though there is no publication or other use of any kind' of any information obtained."[19]

In England, the judiciary has consistently refused to recognize a general tort of privacy.[20] However, judges have responded to the enshrining

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12 William L Prosser, "Privacy" (1960) 48:3 Cal L Rev 383 at 389.

13 *Ibid* at 392.

14 *Ibid* at 398.

15 *Ibid* at 401.

16 *Restatement (Second) of Torts* § 652 (1977) [*Restatement*].

17 See Prosser, *supra* note 12.

18 Samuel D Warren & Louis D Brandeis, "The Right to Privacy" (1890) 4:5 Harv L Rev 193.

19 *Restatement*, *supra* note 16, cited in *Jones*, *supra* note 1 at para 20.

20 See *Wainwright v Home Office* [2003] UKHL 53 at paras 18–19, [2004] 2 AC 406, Lord Hoffmann [*Wainwright*]:

by the *HRA* of the *ECHR* into domestic law[21] by fashioning a "new" tort of "misuse of private information" out of the older, equitable doctrine of confidence.[22] Misuse of private information provides limited relief for informational privacy violations, along the lines of the United States' publication of private facts tort.[23] In adapting the common law to give effect to *ECHR* rights (in this instance, the Article 8 right to "private and family life"),[24] the English judiciary has given a form of indirect horizontal effect to the *ECHR*.[25] As noted above, it is on the matter of this indirect horizontality that much recent academic commentary and analysis of the state of English privacy law has tended to focus.[26]

The lack of an intrusion-type tort leaves substantial gaps in privacy protection in English law—gaps that have attracted criticism from pro-privacy commentators.[27] In the context of the tort of misuse of private in-

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> The need in the United States to break down the concept of 'invasion of privacy' into a number of loosely-linked torts must cast doubt upon the value of any high-level generalisation which can perform a useful function. ... English law has so far been unwilling, perhaps unable, to formulate any such high-level principle. ...
>
> [T]he [English] courts have so far refused to ... formulate a general principle of 'invasion of privacy'.

See also *Kaye v Robertson*, [1991] FSR 62 at 66, (available on WL Can), Glidewell LJ [*Kaye*] ("[i]t is well-known that in English law there is no right to privacy, and accordingly there is no right of action for breach of a person's privacy").

21 *HRA*, *supra* note 5, preamble.

22 *Campbell*, *supra* note 3. See also Eady J, *supra* note 2.

23 *Restatement*, *supra* note 16.

24 *ECHR*, *supra* note 5, art 8.

25 The effect is horizontal since it impacts upon the relationship between private parties and indirect since domestic private law remains the mechanism through which liability may be established (as opposed to direct reliance upon the *ECHR* itself). See Young, *supra* note 5.

26 See e.g. Hunt, *supra* note 4; Gavin Phillipson, "The Human Rights Act, 'Horizontal Effect' and the Common Law: A Bang or a Whimper?" (1999) 62:6 Mod L Rev 824 [Phillipson, "Human Rights Act"]; Buxton, *supra* note 5; Wade, *supra* note 5; Anthony Lester & David Pannick, "The Impact of the Human Rights Act on Private Law: The Knight's Move" (2000) 116 Law Q Rev 380; Deryck Beyleveld & Shaun D Pattinson, "Horizontal Applicability and Horizontal Effect" (2002) 118 Law Q Rev 623; Jonathan Morgan, "Privacy, Confidence and Horizontal Effect: 'Hello' Trouble" (2003) 62:2 Cambridge LJ 444; Moreham, "Privacy and Horizontality", *supra* note 5; Gavin Phillipson, "Clarity Postponed: Horizontal Effect After *Campbell*" in Helen Fenwick, Gavin Phillipson & Roger Masterman, eds, *Judicial Reasoning Under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2007) 143; Phillipson & Williams, *supra* note 5.

27 See O'Callaghan, *Refining Privacy*, *supra* note 5, particularly at 153–55. See also Patrick O'Callaghan, "Privacy in Pursuit of a Purpose?" (2009) 17:2 Tort L Rev 100; Rich-

formation, *Campbell* and subsequent English authorities assume a requirement that the defendant publish the offending information in order to attract liability. Just one case, *Tchenguiz v. Imerman*, contains statements seriously suggesting that the tort of misuse of private information might provide a remedy in circumstances where private information has been wrongfully *acquired* but not published.[28] However, the Court of Appeal's statements to that effect in *Tchenguiz* were only *obiter*, and the question has not been revisited in the higher courts since. It is noteworthy that, in light of *Jones* and a recent further development in New Zealand, England currently finds itself lagging behind other common law countries in this respect.

In New Zealand, a "private facts" tort was recognized by the Court of Appeal in *Hosking v. Runting*.[29] It provides relief for informational privacy violations where two elements are satisfied: first, that facts exist in respect of which the plaintiff had a reasonable expectation of privacy; and second, that the publicity given to those facts would be considered "highly offensive to an objective reasonable person."[30] Whether an intrusion tort might also be recognized was a question left open in that case.[31] It is striking, then, that in August 2012, the New Zealand High Court recognized an intrusion tort in the case of *C v. Holland*, citing *Jones* heavily and following its methodology closely.[32] This marks a departure for New Zealand from merely protecting informational privacy interests.

In Australia, the High Court case *Australian Broadcasting Corp v. Lenah Game Meats Pty Ltd*[33] expressly "left the door open to the recognition of a common law right to privacy."[34] Subsequently, in *Grosse v. Purvis*, an intrusion tort was recognized by the Queensland District Court in terms highly reminiscent of the American tort.[35] However, this decision has not been followed by higher courts. *Grosse* was not followed by the Federal Court in *Kalaba v. Commonwealth of Australia*, although nothing significant was provided in the way of reasons for this, and the court ap-

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ard Mullender, "Privacy, Imbalance and the Legal Imagination" (2011) 19:2 Tort L Rev 109 [Mullender, "Privacy"].

28 [2010] EWCA Civ 908, [2011] Fam 116 [*Tchenguiz*].

29 [2004] NZCA 34, [2005] 1 NZLR 1 [*Hosking*].

30 *Ibid* at para 117.

31 *Ibid* at para 118.

32 [2012] NZHC 2155, [2012] 3 NZLR 672 [*Holland*].

33 [2001] HCA 63, (2001) 208 CLR 199 [*Lenah Game Meats*].

34 *Jones*, *supra* note 1 at para 63.

35 [2003] QDC 151 (available on AustLII) [*Grosse*].

peared simply to rely on the absence of earlier authority.[36] Moreover, although the question of whether an intrusion tort ought to be recognized was referred to by the Victoria Court of Appeal in *Giller v. Procopets*, the court declined to comment on it, since the claim could be disposed of on other grounds.[37]

Thus, the United States has recognized an intrusion tort, and in Australia the higher courts have not closed the door on the adoption of one, while a lower court decision has given some indication of a willingness to introduce such a tort. In England, the courts have consistently rejected the notion of a general privacy tort, but have recognized an informational privacy tort, which evolved from the doctrine of confidence. In New Zealand, an informational tort was recognized in 2004, while *Jones* itself has seemingly inspired the adoption there of a separate intrusion tort in the summer of 2012.

I will now give an overview of the judgment in *Jones* before analyzing its constituent elements in detail.

A. Jones v. Tsige*: An Overview of the Judgment*

The appellant (plaintiff) Jones and respondent (defendant) Tsige both worked for different branches of the Bank of Montreal ("BMO"). They did not know each other and had only one, indirect connection: the respondent was in a relationship with the appellant's former husband. Over a period of around four years, the respondent accessed the appellant's BMO bank accounts at least 174 times using her workplace computer. This gave the respondent access to the appellant's personal information, including the appellant's date of birth, marital status, and residential address, as well as details of her account transactions. Notably, the respondent did not disseminate any of this information. Upon being discovered, she admitted to accessing the appellant's records and apologized. Jones nonetheless brought claims for invasion of privacy and breach of fiduciary duty and moved for summary judgment. Tsige brought a cross-motion to dismiss the claims summarily.[38]

Justice Whitaker, the motions judge, granted Tsige's motion and dismissed both claims, awarding costs against Jones in the amount of $35,000. The motions judge considered himself bound by the decision in *Euteneier v. Lee*, where it had been held that there was no "free-standing"

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36 [2004] FCA 763 (available on WL Can).

37 [2008] VSCA 236 (available on WL Can).

38 *Jones v Tsige*, 2011 ONSC 1475, 333 DLR (4th) 566 [*Jones* ONSC].

right to privacy either under the Canadian *Charter* or at common law.[39] Jones appealed against the dismissal of the invasion of privacy claim, averring that Justice Whitaker had erred in law when holding that Ontario did not recognize a cause of action for invasion of privacy.

In the Court of Appeal, Justice Sharpe, with whom Chief Justice Winkler and Justice Cunningham (*ad hoc*) concurred, held that Ontario law did indeed recognize an intrusion upon seclusion tort protecting privacy interests, and reversed the motions judge's finding. Justice Sharpe ultimately awarded Jones $10,000 in damages, ordering each party to bear its own costs. He rejected Tsige's argument that the "complex legislative framework" put in place to deal with some aspects of privacy by the federal and Ontario governments precluded the adaptation of the common law to provide redress in circumstances such as those in *Jones* (that is, where the plaintiff's private affairs had been intruded upon).[40]

Justice Sharpe starts by pointing out that "[t]he question of whether the common law should recognize a cause of action in tort for invasion of privacy has been debated for the past one hundred and twenty years."[41] Protection for privacy interests has been found through various legal mechanisms including breach of confidence, defamation, copyright, nuisance, and "various property rights".[42] However, Justice Sharpe adopts the observation of Justice Adams from *Ontario (AG) v. Dieleman* that "invasion of privacy in Canadian common law continues to be an inceptive, if not ephemeral, legal concept."[43]

From an early stage of the judgment, Justice Sharpe looks to the intrusion upon seclusion tort from the United States' *Second Restatement of Torts* for guidance as to how a similar tort might be formulated for Ontario.[44] Justice Sharpe chooses to "focus primarily" on the intrusion tort (as

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39 (2005) 77 OR (3d) 621 at para 63, (available on CanLII) (CA), Cronk JA [*Euteneier*].

40 *Jones*, *supra* note 1 at paras 47–54. Tsige had argued that the existence of various statutes precluded the common law development of a privacy tort. These statutes included: *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5; *Personal Health Information Protection Act*, SO 2004, c 3; *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F-31; *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M-56; *Consumer Reporting Act*, RSO 1990, c C-33. Justice Sharpe states that "it would take a strained interpretation to infer from these statutes a legislative intent to supplant or halt the development of the common law in this area" (*Jones*, *supra* note 1 at para 49).

41 *Ibid* at para 15.

42 *Ibid*.

43 (1994) 117 DLR (4th) 449 at 688 (available on CanLII) (ON Gen Div), cited in *Jones, supra* note 1 at para 15.

44 *Jones*, *supra* note 1 at para 18ff.

opposed to the other three), having explained that "confusion may result from a failure to maintain appropriate analytic distinctions between the [four] categories [of torts]."[45] Moreover:

> [A]s a court of law, we should restrict ourselves to the particular issues posed by the facts of the case before us and not attempt to decide more than is strictly necessary to decide that case. A cause of action of any wider breadth would not only over-reach what is necessary to resolve this case, but could also amount to an unmanageable legal proposition that would ... breed confusion and uncertainty.[46]

In the search for a formula for a new tort, therefore, Justice Sharpe expresses a preference for the American intrusion model from an early point in his judgment. (This is in preference to, for example, the English model of protecting privacy through the informational tort, misuse of private information.) Indeed, he approves of Linden and Feldthusen's observation that Canadian privacy law "seem[s] to be drifting closer to the American model."[47] Justice Sharpe notes that his own analysis of Canadian case law "supports the same conclusion": "Ontario has already accepted the existence of a tort claim for appropriation of personality and, at the very least, remains open to the proposition that a tort action will lie for an intrusion upon seclusion."[48]

It was stated in *Euteneier* that "there is no 'free standing' right to dignity or privacy under the *Charter* or at common law."[49] Justice Sharpe, however, distinguishes the facts of *Euteneier* with relative ease, remarking that this statement "could not have been intended to express any dispositive or definitive opinion as to the existence of a tort claim for breach of a privacy interest."[50] Justice Sharpe considers several authorities that were inconclusive[51] and one that was hostile[52] to the notion that an intrusion-type tort of privacy could be recognized. He asserts that in other Ontario cases, "where the courts did not accept the existence of a privacy

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45 *Ibid* at para 21.

46 *Ibid*.

47 Allen M Linden & Bruce Feldthusen, *Canadian Tort Law*, 9th ed (Markham: LexisNexis, 2011) at 59, cited in *Jones*, *supra* note 1 at para 23.

48 *Jones*, *supra* note 1 at para 24. The case establishing liability for "appropriation of personality" to which Justice Sharpe is referring is *Athans v Canadian Adventure Camps Ltd* (1977), 80 DLR (3d) 583, 17 OR (2d) 425 (HCJ) [*Athans*].

49 *Euteneier*, *supra* note 39 at para 63.

50 *Jones*, *supra* note 1 at para 38.

51 See *Saccone v Orr* (1981), 34 OR (2d) 317, 19 CCLT 37 (Co Ct) [*Saccone*]; *Roth v Roth* (1991), 4 OR (3d) 740, 9 CCLT (2d) 141 (Gen Div) [*Roth*]. See also *Krouse v Chrysler* (1973), 1 OR (2d) 225 (CA) [*Krouse*], followed in *Athans*, *supra* note 48.

52 See *Euteneier*, *supra* note 39.

tort, they rarely went so far as to rule out the *potential* of such a tort."[53] Rather, "[t]he clear trend in the case law is, at the very least, to leave open the possibility that such a cause of action does exist."[54] Acknowledging that "[i]n Canada, there has been no definitive statement from an appellate court on the issue of whether there is a common law right of action corresponding to the intrusion on seclusion category," Justice Sharpe points out that, in several cases, courts have refused to strike out such claims.[55] Indeed, he goes on to argue that "dicta in at least two cases [from other provinces] support the idea" that a common law right of action for intrusion-type privacy violations can lie.[56] Moreover, he points to "the principle that the common law should be developed in a manner consistent with *Charter* values" to bolster the case for recognition of a new tort.[57]

Justice Sharpe also considers case law from other common law jurisdictions as he surveys different approaches to protecting privacy. He takes cognizance of the approaches in England, New Zealand, and Australia. Notably, he highlights New Zealand and Australian authorities[58] whose reasoning reflects the American formulation of the intrusion tort, requiring the defendant's conduct to be "highly offensive to a reasonable person" before liability is imposed.[59]

Having conducted a broad survey of domestic and foreign law relating to privacy, and having considered the impact of *Charter* jurisprudence on the matter, Justice Sharpe concludes: "[The r]ecognition of ... a cause of action [for intrusion upon seclusion] would amount to an incremental step

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53 *Jones*, *supra* note 1 at para 31.

54 *Ibid* at para 25. See *Saccone*, *supra* note 51; *Roth*, *supra* note 51; *Krouse*, *supra* note 51; and *Athans*, *supra* note 48.

55 *Jones*, *supra* note 1 at para 25. Justice Sharpe goes on to cite *Somwar v McDonald's Restaurants of Canada Ltd* (2006), 79 OR (3d) 172 (available on CanLII) (SC); *Nitsopoulos v Wong* (2008), 298 DLR (4th) 265 (available on CanLII) (ONSC); *Capan v Capan* (1980), 14 CCLT 191 (available on QL) (ONHCJ); *Lipiec v Borsa*, 31 CCLT (2d) 294 (available on QL) (ON Gen Div); *Shred-Tech Corp v Viveen*, 2006 CanLII 41004 (ONSC).

56 *Jones*, *supra* note 1 at para 33. See *Motherwell v Motherwell* (1976), 73 DLR (3d) 62 (available on CanLII) (Alta SCAD); *Dyne Holdings Ltd v Royal Insurance Co of Canada* (1996), 135 DLR (4th) 142 (available on CanLII) (PE SCAD), leave to appeal to SCC refused, [1996] SCCA No 344.

57 *Jones*, *supra* note 1 at para 46.

58 See *Grosse*, *supra* note 35; *Lenah Game Meats*, *supra* note 34; *Hosking*, *supra* note 29.

59 *Jones*, *supra* note 1 at paras 63–64.

that is consistent with the role of this court to develop the common law in a manner consistent with the changing needs of society."[60]

Justice Sharpe also states that the intrusion upon seclusion tort that he is recognizing "essentially adopt[s] as the elements of the action ... the *Restatement (Second) of Torts* (2010) formulation."[61] He then outlines the key features of the new intrusion tort, which he models closely on William Prosser's from the *Restatement*, which contains a three-part structure:

> [F]irst ... the defendant's conduct must be intentional, within which I would include reckless; second ... the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and third, ... a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish.[62]

For comparison, Prosser's original intrusion tort under United States law is set out in the following terms: "One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the invasion would be highly offensive to a reasonable person."[63]

In this overview of the judgment, we have seen how Justice Sharpe structures his decision. I have been able to briefly flag up key aspects of his reasoning. It is particularly noteworthy that his inspiration for the model of the intrusion tort he recognizes comes from the United States, rather than from England, given Canada's traditional links with English common law. Having briefly outlined and contextualized *Jones*, I will next put in place a background to my analysis of Justice Sharpe's methodology by exploring the notion of "legal imagination" before scrutinizing the case in detail.

B. Legal Imagination

The "legal imagination" is a particular facet of the imaginative faculties. If (as we shall see later) a deontological moral impulse to advance the cause of corrective justice provides judges with a reason to act (that is, to develop the common law to plug a doctrinal gap), while incrementalism provides the method for doing so, legal imagination is the link between the two. Put simply, the legal imagination demonstrated by Justice Sharpe in *Jones* is what enables him to see how the recognition of a new tort of privacy might be possible. It is what guides him in constructing a

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60 *Ibid* at para 65.

61 *Ibid* at para 70.

62 *Ibid* at para 71.

63 *Restatement*, *supra* note 16, § 652B.

persuasive justificatory argument for that jurisprudential advancement, whereby he remains sensitive to the need to engage in incremental development of the law and to have regard to countervailing consequentialist concerns. Legal imagination is what leads Justice Sharpe from a *desire* to do something to the recognition and utilization of a method by which he can *actually* achieve a change in the law.

What is meant by "legal imagination" is an ability to engage in a particular type of imaginative exercise that is peculiar to lawyers. Legal imagination is "a power that organizes what is seen and claims a meaning for it."[64] Richard Mullender tells us that:

> Those who possess this capacity [to exercise legal imagination] are able to detect defects in law (eg, doctrinal inconsistencies) and to identify means by which to correct them.[65]
>
> Lawyers who can identify unrealised possibilities in the law (eg the ability incrementally to extend an existing head of liability) exhibit legal imagination. So too do those lawyers who are able to systematise collections of authorities, doctrine, and principles that lack a well-defined shape.[66]

James Boyd White sees imagination as integral to legal practice, with the lawyer's role in the legal system being simultaneously analytical, rhetorical, and literary.[67] This is a view famously expressed by Justice Felix Frankfurter of the Supreme Court of the United States in a letter he wrote replying to a child who had sought his advice on the best educational route to take in order to become a lawyer.[68] Justice Frankfurter told the boy that "cultivation of the imaginative faculties" is integral to a lawyer's job; "[n]o one can be a truly competent lawyer" without developing the imagination.[69]

The legal imagination may be said to be distinct from other types of imagination in which different moral impulses may find expression.[70] The legal imagination has an internal focus. It is constrained to exercises of

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64 James Boyd White, *The Legal Imagination*, abridged ed (Chicago: University of Chicago Press, 1985) at 209.

65 Mullender, "Privacy", *supra* note 27 at 111.

66 Mullender, "Judging", *supra* note 9 at 928 [footnote omitted].

67 White, *supra* note 64, ch 1.

68 Letter from Felix Frankfurter to Paul Claussen Jr (May 1954) in Ephraim London, ed, *The Law* as *Literature* (New York: Simon and Schuster, 1960) at 725.

69 *Ibid*.

70 For example, the "sociological imagination", identified by C Wright Mills, may include an egalitarian impulse not necessarily present within legal imagination. See C Wright Mills, *The Sociological Imagination*, 2d ed (Harmondsworth: Penguin Books, 1970).

imagination that speak to providing reasons for *legal* action (or inaction). Mullender notes that

> [s]ome characterise [the legal imagination] as conservative since those who possess it cleave to settled ways of thinking. Others see lawyers as being daring and active[,] ... ever ready to work up new arguments in an effort to advance the interests of those they represent.[71]

We might add to Mullender's definition that those who are able to exercise legal imagination possess the ability to identify circumstances in which it is acceptable (that is, within the bounds of incrementalism) to recognize *new* heads of liability and to work up arguments making this possible.[72] For judges do not operate in an infinite space where their role has no limits. Rather, they function within particular legal systems, which are "fields of interpretative possibility within which judges may specify a range of politically controversial norms."[73] The spatial metaphor Mullender uses—"fields"—is a useful one. Richard Posner, arguing that judges are "occasional legislator[s]",[74] suggests that judges develop the law by engaging in a creative exercise within a "zone of reasonableness". This is "the area within which [the judge] has discretion to decide a case either way without disgracing himself."[75] Posner explains that "[t]he breadth of the zone varies with the field of law ... [and] is narrower in fields of ideological consensus," such as contract law.[76] Privacy, however, is a deeply divisive legal issue[77] and does not attract such consensus. It follows that a judge who is engaging in acts of law-making in the field of privacy would, on Posner's analysis, enjoy a wider "zone of reasonableness".[78]

We can find greater clarity in our notion of the legal imagination by separating its descriptive and prescriptive aspects. On such a division, those who exercise the descriptive legal imagination might find novel

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71 Mullender, "Privacy", *supra* note 27 at 114.

72 See Subsection I.D.4., below ("Incrementalism").

73 Mullender, "Judging", *supra* note 9 at 915. See also Richard Mullender, "Parliamentary Sovereignty, the Constitution, and the Judiciary" (1998) 49:2 N Ir Legal Q 138 at 152–54.

74 Richard A Posner, *How Judges Think* (Cambridge, Mass: Harvard University Press, 2008) at 78.

75 *Ibid* at 86.

76 *Ibid* at 87.

77 See Daniel J Solove, *Understanding Privacy* (Cambridge, Mass: Harvard University Press, 2008), ch 1.

78 However, Posner acknowledges that this zone does have its limits. In particular, he has postulated that judges are constrained in their activities by certain "internal" and "external" factors (*supra* note 74 at ch 5, 7).

ways to classify or categorize legal doctrine,[79] as Prosser did in the *Second Restatement*, but they are primarily concerned only with stating what the law *is*. This aspect of legal imagination is likely to be conservative and may often be purely reductive. It is broadly useful to lawyers and jurists since it may assist in the codification of diverse pieces of doctrine. It will be appealing to formalists.[80] It is likely that most (if not all) lawyers exhibit the ability to exercise this descriptive aspect of imagination. Yet those who also exercise the *prescriptive* legal imagination exhibit the *additional* capacity to envisage what the law *could* be and, crucially, how such development might compellingly be argued for. As such, the prescriptive legal imagination is the more "daring and active".[81] It is a normative aspect of imagination. It allows lawyers to "stretch the boundaries of legal thought, to explore novel issues and novel answers to old problems."[82]

There is a relationship between the exercise of the prescriptive aspect of legal imagination and the process of judicial elaboration of the law—a process known to common lawyers as incrementalism, the notion that the judiciary ought only to develop the law on an incremental basis. Incrementalism aims to restrain courts from encroaching on the role of the legislature (that is, sweeping changes in the law ought to be left to democratically elected legislators). Thus, the prescriptive aspect of legal imagination enables a lawyer to (a) recognize an instance where, and envisage how, judicial development of the law may be achieved incrementally; and (b) construct a sufficiently persuasive argument in favour of that development. It thus links the impulse to act with the practical means to succeed. I will return to the notion of incrementalism below, as I scrutinize its role in *Jones*.

Mullender's characterization of the legal imagination does raise the question as to at what point the imagination reaches the limits of being distinctly "legal" and strays into other fields. Ultimately, a judge's imagination would stray beyond the legal where it leads her to base her reasoning outside of the common law constraints which she is under. This would

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79 See Mullender, "Judging", *supra* note 9 at 928.

80 On formalism generally, see Roberto Mangabeira Unger, "The Critical Legal Studies Movement" (1983) 96:3 Harv L Rev 561 at 563–76; Ernest J Weinrib, "Legal Formalism: On the Immanent Rationality of Law" (1988) 97:6 Yale LJ 949 at 949 [Weinrib, "Legal Formalism"]. On textualism, see Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1997).

81 Mullender, "Privacy", *supra* note 27 at 114.

82 Edward Berry, "Thomas More and the Legal Imagination" (2009) 106:3 Studies in Philology 316 at 327–28. This (my) essay should not be read as suggesting that these two aspects of legal imagination are mutually exclusive, or that there is no overlap between them. Indeed, many aspects of legal analysis require, to a degree, the exercise of both descriptive and prescriptive powers of imagination.

entail straying beyond Posner's "zone of reasonableness" or Mullender's "interpretive field" and usurping the role of the legislature. Of course, the parameters of the incremental "zone" or "field", beyond which lie the dangerous waters of legislative usurpation, are forever uncertain. Some judges act conservatively, staying well away from the edges of the map. Others seem to see the benefits of a more activist approach as being worth the risk of sailing much closer to the edge. Posner's view, which is drawn from his essentially pragmatic philosophy on judging, is that as long as a judge's decision is accepted (that is, not subsequently overruled by a higher court), she has successfully remained in safe waters.[83] The most successful legally imaginative prescriptive argument, therefore, is the one that argues most persuasively for the greatest amount of *achievable* (in the sense that it will be acceptable, though not necessarily uncontroversial) doctrinal development.

The purely descriptively imaginative judge, by contrast, may give up at the point where doctrine indicates that no cause of action can lie in the novel case. This is the point at which, for formalists, law "runs out".[84] Indeed, even for those who espouse a "narrow" approach to incremental common law development,[85] this point is reached quickly in privacy cases.[86] But the prescriptively imaginative lawyer is more optimistic (and, arguably, more imaginative per se). She supplements a lack of doctrine by appealing to the principles underlying certain areas of jurisprudence. For tort lawyers, this tends to mean a commitment to the pursuit of corrective justice. We will see just such an appeal in Justice Sharpe's judgment.

In the analysis that follows, I will explore key aspects of *Jones* in more depth. In so doing, I can draw out issues that invest privacy law with politico-legal significance. First, I will consider the moral impulse that, on the analysis offered, impelled Justice Sharpe to recognize the new tort.

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83 Posner, *supra* note 74 at 83ff.

84 See Brian Z Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (Princeton: Princeton University Press, 2010) at 186. By contrast, Ronald Dworkin would argue that law never "runs out", for when legal rules fail to disclose a clear answer to a problem, judges are always able to exercise discretion and have recourse to underlying principles in order to establish a way forward. See Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977) at 81–130.

85 See Subsection I.D.4., below ("Incrementalism").

86 See *Jones* ONSC*, supra* note 38. See also *Wainwright*, *supra* note 20; *Kaye*, *supra* note 20.

C. Qualified Deontology

There is reason to suggest that Justice Sharpe's judgment is informed by a school of moral reasoning that Mullender calls "qualified deontology".[87] Deontology is a moral philosophy that "gives expression to the view that right conduct consists in doing that which is intrinsically just (*e.g.* paying due regard to morally significant rights, even if the cost of doing so is high)."[88] Deontology, in its pure form, stands in fundamental opposition to teleological, or consequentialist, reasoning. Strict deontological reasoning considers an act's consequences irrelevant to its moral justification; only the means may justify the means. By contrast, bare consequentialism, as a reasoning method, requires acts or rules to be judged by sole reference to their certain (or anticipated) consequences. Thus, consequentialist reasoning tells us that desirable ends may justify whatever means are necessary to achieve them. Consequentialist concerns are therefore often highlighted in argument before the courts as reasons to not impose liability on defendants or to not extend liability rules.[89]

A moral philosophy informed by *qualified* deontology prioritizes deontological interests, but does not guarantee them absolutely:

> The law's addressees are assumed to have intrinsic worth and their interests are assumed to merit a significant measure of protection. Moreover, it is assumed to be intrinsically right to require those who wrongfully inflict harm on others to repair the damage done. These deontological moral impulses are, however, qualified by consequentialist ones. In circumstances where the costs (or anticipated costs) of imposing liability are high, they may support the conclusion that liability should not be imposed.[90]

From Justice Sharpe's desire to protect the plaintiff's significant (privacy) interests, we will see that a deontological strand of thought informs his reasoning. This strand is not, however, untempered. For Justice Sharpe is alive to the consequentialist concerns that are relevant to courts developing new (or expanding existing) causes of action. He is sensitive to the concern that the floodgates of litigation could be opened if the law de-

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87 See Richard Mullender, "Judicial Review and the Rule of Law" (1996) 112 Law Q Rev 182 [Mullender, "Judicial Review"]; Richard Mullender, "*Prima Facie* Rights, Rationality and the Law of Negligence" in Matthew H Kramer, ed, *Rights, Wrongs and Responsibilities* (Basingstoke, UK: Palgrave, 2001) 175.

88 Mullender, "Judicial Review", *supra* note 87 at 185.

89 See Richard Mullender, "English Negligence Law as a Human Practice" (2009) 21:3 Law & Literature 321 at 330 [Mullender, "English Negligence Law"].

90 Richard Mullender, "Tort, Human Rights, and Common Law Culture" (2003) 23:2 Oxford J Legal Stud 301 at 308 [Mullender, "Common Law Culture"; footnotes omitted].

velops too far and too quickly.[91] He also exhibits sensitivity to the importance of free speech, which often conflicts with privacy claims.[92] However, he engages with these consequentialist concerns and explains in some detail why any fears as to negative consequences for the law at large can be allayed by the limitations he places on the intrusion tort's ambit. Mirroring the U.S. intrusion tort, the Canadian cause of action can be utilized only where the intrusion would be "highly offensive" to a reasonable person.[93] No cause of action will lie, Justice Sharpe explains, for individuals "who are sensitive or unusually concerned about their privacy."[94] Rather, "it is only intrusions into matters such as one's financial or health records, sexual practices and orientation, employment, diary or private correspondence that, viewed objectively on the reasonable person standard, can be described as highly offensive."[95] Justice Sharpe also states that "no right to privacy can be absolute" and that, where privacy conflicts with competing free speech interests, privacy will, in some instances, need to yield to these competing claims.[96] The model for the intrusion tort that he adopts is designed to allow for competing consequentialist concerns to defeat privacy claims in some circumstances. His recognition that (a) there are competing interests that will conflict with privacy claims, and that (b) privacy interests ought not to automatically trump competing interests (even if they are accorded some degree of presumptive priority), as well as his sensitivity to the floodgates concern, show that Justice

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91 See *Jones*, *supra* note 1 at para 72.

92 *Ibid* at para 73.

93 This also resonates with the requirements of the privacy tort in Australia (see *Lenah Game Meats*, *supra* note 33). In England, the "highly offensive" test was put forward by Lord Hope in *Campbell* (*supra* note 3 at paras 93–102), but did not receive support from the other members of the House of Lords. It has resurfaced occasionally in post-*Campbell* decisions (see e.g. *Murray v Express Newspapers*, [2008] EWCA Civ 446, [2009] Ch 481; NA Moreham, "Privacy in the Common Law: A Doctrinal and Theoretical Analysis" (2005) 121 Law Q Rev 628 [Moreham, "Privacy in the Common Law"]).

94 *Jones*, *supra* note 1 at para 72.

95 *Ibid*. Strikingly, this list appears to concern categories of information, rather than types of intrusion or intrusive behaviour, which is somewhat at odds with Justice Sharpe's assertion that "[i]f Jones has a right of action, it falls into Prosser's first category of intrusion upon seclusion" as opposed to another of Prosser's torts, the informational tort of publication of private facts (*ibid* at para 21). This may indicate a particular sensitivity to the need to allay consequentialist fears that his judgment is overly activist.

96 *Ibid* at para 73. Justice Sharpe analogizes the conflict between privacy and free speech to that between reputation and free speech in the tort of defamation. This conflict was recently the subject of examination by the Supreme Court of Canada in *Grant v Torstar Corp*, where the Court confirmed the existence of a defence of "responsible communication on matters of public interest" in defamation actions in order to better protect free expression (2009 SCC 61 at para 7, [2009] 3 SCR 640 [*Torstar*]).

Sharpe's deontological focus is amenable to qualification. Thus it can be said that his judgment follows a qualified deontological moral philosophy.

Since, in qualified deontology, presumptive priority is given to deontological interests, we can postulate that Justice Sharpe's own deontological moral outlook motivated him to engage in legal development of the common law in order to accommodate a remedy for the plaintiff.[97] The desire to afford protection for the fundamental right to privacy may plausibly be said to have been Justice Sharpe's call to action. In the next section, I will explore the method by which he manages to give practical effect to this desire to provide the plaintiff with redress.

D. Scrutinizing the Judgment in Jones

1. *Charter* values

I noted in Part I how Justice Sharpe's judgment deals with inconclusive common law authority on the intrusion question. Justice Sharpe also makes an appeal to *Charter* values, explaining that "*Charter* jurisprudence identifies privacy as being worthy of constitutional protection and integral to an individual's relationship with the rest of society and the state."[98] This is particularly important since the Canadian *Charter* (unlike the U.K. *Human Rights Act*)[99] does not contain a provision explicitly protecting privacy.[100] Justice Sharpe draws on the interpretation of section 8 of the *Charter* in *Hunter v. Southam Inc*,[101] where Justice Dickson (as he then was) "observed that the interests engaged by s. 8 are not simply an extension of the concept of trespass, but rather are grounded in an independent right to privacy held by all citizens."[102] Justice Sharpe then points to "three distinct privacy interests" that have been recognized in *Charter*

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97 Rather than asserting psychological fact, which may be objected to (though see note 130, *infra*), my analysis here ought to be taken as the beginnings of an exercise in "rational reconstruction", meaning "the production of clear and systematic statements of legal doctrine, accounting for ... case law in terms of organizing principles" (Neil MacCormick, "Reconstruction After Deconstruction: A Response to CLS" (1990) 10 Oxford J Legal Stud 539 at 556).

98 *Jones*, *supra* note 1 at para 39.

99 *HRA*, *supra* note 5, art 8.

100 Privacy has, however, been held by the Supreme Court of Canada to be encompassed within s 8 of the *Charter*'s protection against unreasonable searches. See *Hunter v Southam Inc*, [1984] 2 SCR 145, 11 DLR (4th) 641 [*Hunter* cited to SCR]; *R v Dyment*, [1988] 2 SCR 417, 55 DLR (4th) 503.

101 *Hunter*, *supra* note 100 at 158–59.

102 *Jones*, *supra* note 1 at para 39.

jurisprudence: personal, territorial, and informational privacy.[103] Justice Sharpe cites Supreme Court authority for the proposition that, while the *Charter* "does not apply to common law disputes between private individuals," the common law ought to be developed "in a manner consistent with *Charter* values."[104]

A useful comparison might be drawn here between Justice Sharpe's reliance upon *Charter* values as a basis for common law development and the effect which the U.K. *Human Rights Act* has had upon the English common law in respect of privacy. Both the *Charter* and the European *Convention*[105] (given domestic effect in England by the *HRA*)[106] are higher-order forms of law. The principles that they contain can be seen to impact upon the manner in which lower-order (domestic or even municipal) law is shaped as it is developed. Justice Sharpe draws upon the *values* which underpin the *Charter* and locates, in the absence of any express provision protecting a general privacy right, a general principle that privacy is worthy of protection. He then utilizes this *Charter* value to drive his development of the common law. This method bears much similarity to the notion of weak indirect horizontal effect, which has been mooted alongside other theories of horizontal effect as one possible way in which the *HRA* affects English private law.[107]

Under a "weak" model of indirect horizontal effect, courts are not bound rigidly to apply higher-order rights within lower-order private law, as they would be under a "strong" model; rather, courts may draw on the values underpinning those higher-order rights so that they can then be reflected in the development of lower-order law.[108] The disadvantage of such a model is that it may give rise to uncertainty as to the manner in which these higher-order values might impact upon any given case: it provides judges with wide scope for differing opinions as to the application of these values. Thus it is potentially less effective as a rights-ensuring model

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[103] *Ibid* at para 41.

[104] *Ibid* at para 45. As examples of instances where the Supreme Court has developed the common law "in a number consistent with *Charter* values," Justice Sharpe cites *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573, 33 DLR (4th) 174; *R v Salituro*, [1991] 3 SCR 654, 68 CCC (3d) 289; *Hill v Church of Scientology*, [1995] 2 SCR 1130, 126 DLR (4th) 129 [*Hill*]; *RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd*, 2002 SCC 8, [2002] 1 SCR 156; *Torstar*, *supra* note 74 (*Jones*, *supra* note 1 at para 45).

[105] *ECHR*, *supra* note 5.

[106] *HRA*, *supra* note 5, preamble.

[107] See Young, *supra* note 5 at 39–42. See also Phillipson, "Human Rights Act", *supra* note 14 at 830.

[108] *Ibid*.

than is a "strong" form of indirect horizontality.[109] However, just as it is less definitive, so it provides greater scope for the judge who is concerned with "paying due regard to morally significant rights" to draw on an indeterminate concept—values—to justify quite radical common law development.[110] It places greater control of the direction in which the common law will develop into the hands of the lower-level judiciary (that is, judges below the level of the court which adjudicates definitively on higher-order rights and values—the Supreme Court of Canada and the European Court of Human Rights, in my examples).

However, there remains a weakness in the case that Justice Sharpe makes for *Charter* values justifying radical common law development. His reference to *Charter* values is—perhaps necessarily—both brief and a little vague. A "value" is an ephemeral concept, and there is a limit to the precision with which it may ever be used. Even so, Justice Sharpe devotes just eight paragraphs (out of ninety-three) in his judgment to an explanation of his use of privacy as an underlying *Charter* value.[111] Moreover, the authority he cites in relation to privacy being a *Charter* value cannot be said to be entirely dispositive of whether intrusion upon seclusion is an actionable tort at common law.[112] Rather, Justice Sharpe establishes that (a) privacy (including informational privacy) is an underlying "value",[113] and that (b) a line of Supreme Court authority directs that the common law ought to be developed in accordance with *Charter* values.[114] But manoeuvring from that position to the conclusion that (a) and (b) support "the recognition of a civil action for damages for intrusion upon the plaintiff's seclusion"[115] (that is, in *this* particular case) logically requires a third step: (c). That third step is the point at which it must be convincingly argued that the plaintiff's privacy interest would not be adequately protected unless the court takes the particular step of recognizing an intrusion tort. This step is missing from the *Charter* values argument.

That argument, then, does not of itself provide complete justification for the step that Justice Sharpe takes. There are grounds to believe that he recognized the limitations of the *Charter* values argument, which may be drawn out by the ways in which he circumvents its weaknesses. He

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109 See Young, *supra* note 5 at 42–47.

110 Mullender, "Judicial Review", *supra* note 87 at 185.

111 See *Jones*, *supra* note 1 at paras 39–46.

112 *Ibid* at para 14.

113 *Ibid* at para 43.

114 *Ibid* at para 46.

115 *Ibid*.

considers common law cases on the point[116]—if they disclosed positive authority for the recognition of an intrusion tort then, arguably, Justice Sharpe would have successfully avoided the need to rely on *Charter* values. But the authorities on point were, as we have seen, inconclusive. So an appeal to common law jurisprudence cannot form the basis of the missing step (c). Instead, to supplement the *Charter* values argument, Justice Sharpe—in a leap of imagination—makes a further appeal to another underlying principle: the ideal of corrective justice.

2. Corrective Justice

The theory that corrective justice is the ideal that underpins tort law has become one of the two major theories attempting to explain the purpose of tort law generally (the other being one of distributive justice).[117] Corrective justice is a form of justice that "imposes on wrongdoers the duty to repair their wrongs and the wrongful losses their wrongdoing occasions."[118] It requires that where an individual has suffered harm as the result of a wrongful act by the defendant, the defendant must compensate the plaintiff for that harm.[119] In so doing, the defendant is made to "correct" the harm she has caused.

For leading scholars in the field, including Perry,[120] Coleman,[121] Weinrib,[122] Wright,[123] and Epstein,[124] the pursuit of corrective justice within

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116 See *supra* notes 51–52.

117 See Stephen R Perry, "The Moral Foundations of Tort Law" (1992) 77:2 Iowa L Rev 449 [Perry, "Moral Foundation"]; Jules L Coleman, "The Mixed Conception of Corrective Justice" (1992) 77:2 Iowa L Rev 427 [Coleman, "Mixed Conception"]; Weinrib, "Legal Formalism", *supra* note 80; Ernest J Weinrib, "Right and Advantage in Private Law" (1989) 10:5–6 Cardozo L Rev 1283 [Weinrib, "Right and Advantage"]; Ernest Weinrib, "The Special Morality of Tort Law" (1989) 34:3 McGill LJ 403 [Weinrib, "Morality"]; Richard W Wright, "Substantive Corrective Justice" (1992) 77:2 Iowa L Rev 625; Richard A Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, Mass: Harvard University Press, 1985) [Epstein, *Takings*]; Richard A Epstein, "A Theory of Strict Liability" (1973) 2:1 J Legal Stud 151 [Epstein, "Theory"]; Richard A Epstein, "Causation and Corrective Justice: A Reply to Two Critics" (1979) 8:3 J Legal Stud 477 [Epstein, "Causation"].

118 Coleman, "Mixed Conception", *supra* note 117 at 441.

119 One of the most useful considerations of the various corrective justice theories espoused by tort theorists is to be found in Perry, "Moral Foundation", *supra* note 117. Perry considers the suitability of corrective justice as a moral foundation for the protection of privacy interests (*ibid* at 457–58).

120 *Ibid*.

121 See Coleman, "Mixed Conception", *supra* note 117.

122 See Weinrib, "Legal Formalism", *supra* note 80; Weinrib, "Right and Advantage", *supra* note 117; Weinrib, "Morality", *supra* note 117.

tort law necessitates a strong focus on harm: the type of harm, its causes, and its severity.[125] The intrusion tort formulated by Justice Sharpe in *Jones* follows a methodology designed precisely to focus on, and attribute significant weight to, the type and severity of harm suffered by the plaintiff and the *cause* of that harm. The intrusiveness of the defendant's behaviour and the distress caused to the plaintiff thereby were key determining factors in *Jones*.

We can press the analysis of the corrective justice impulse present in the judgment further by reference to Lord Atkin's well-known opinion in the landmark tort case *Donoghue v. Stevenson*.[126] In *Donoghue*, the House of Lords recognized, by a 3–2 majority, a general duty of care in English (and Scottish) negligence law, drawing on the "neighbour principle" identified by Lord Atkin.[127] Lord Atkin's judgment for the majority is replete with references that by implication bespeak a commitment to corrective justice. He dwells on an underlying fundamental principle that, he argues, lends authority to his proposition that English law recognizes a general duty of care owed by defendant to claimant in circumstances where the elements of foreseeability of harm and proximity between the parties can be established.[128] The inference we may draw from his judgment in *Donoghue* is that, although he does not explicitly give it the name, Lord Atkin has in mind the principle that tort law ought to require a defendant who wrongfully causes harm to a claimant to compensate for that wrong. In other words, Lord Atkin's key concern is that the law ought to carry out corrective justice. For Lord Atkin, this is sufficient to justify engaging in quite radical development of the common law:

> I do not think so ill of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilized society and

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123 See Wright, *supra* note 117.

124 See Epstein, *Takings*, *supra* note 117; Epstein, "Theory", *supra* note 117; Epstein, "Causation", *supra* note 117.

125 In a recent essay, John Gardner appraises the theories of Weinrib and Coleman in particular and, defending their theories against the criticism of functionalists, argues that the corrective justice "cannot be reduced out," that "that any complete explanation of tort law—whatever other considerations it may invoke—cannot but invoke considerations of corrective justice" (John Gardner, "What Is Tort Law For? Part 1: The Place of Corrective Justice" (2011) 30:1 Law & Phil 1 at 6).

126 [1932] AC 562; 1932 SC (HL) 31 [*Donoghue* cited to AC].

127 The House of Lords in *Donoghue* was split on the issue of whether or not a general duty of care could be rooted in existing precedents. Lord Buckmaster argued that earlier cases such as *Heaven v Pender* ((1883) 11 QB 503, [1881–5] All ER Rep 35) could not support the recognition of a generally applicable duty. Lord Atkin, in the majority, argued that existing cases could be read in such a way as to support a general duty.

128 *Donoghue*, *supra* note 126 at 598.

> the ordinary claims it makes upon its members as to deny a legal remedy where there is so obviously a social wrong.[129]

There are significant indications that a commitment to the pursuit of corrective justice underpins the judgment of the Ontario Court of Appeal in *Jones*.[130] For instance, Justice Sharpe is particularly concerned by the potential threats to privacy posed by "technological change" (namely "[t]he internet and digital technology"):[131]

> [R]outinely kept electronic data bases render our most personal financial information vulnerable. Sensitive information as to our health is similarly available, as are records of the books we have borrowed or bought, the movies we have rented or downloaded, where we have shopped, where we have travelled, and the nature of our communications by cell phone, e-mail or text message.[132]

Justice Sharpe holds that Tsige had caused Jones "distress, humiliation or anguish" by her actions.[133] He is scathing in his summary of Tsige's behaviour: "[H]er actions were *deliberate, prolonged and shocking*. Any person in Jones' position would be *profoundly disturbed* by the *significant intrusion* into her *highly personal* information."[134]

The clearest indication of Justice Sharpe's commitment to corrective justice is found when he states openly:

> [M]ost importantly, we are presented in this case with facts that cry out for a remedy. ... The discipline administered by Tsige's employer ... did not respond directly to the wrong that had been done to Jones. In my view, the law of this province would be sadly deficient if we were required to send Jones away without a legal remedy.[135]

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[129] *Ibid* at 583.

[130] Corrective justice is not explicitly mentioned in Justice Sharpe's judgment; however, it is very much implied. Moreover, Justice Sharpe was kind enough to confirm to me personally (and entirely informally), when I had the opportunity to speak with him at the Institute of Advanced Legal Studies, London, following a lecture he gave there in May 2012, that a desire to do corrective justice had informed his thinking in *Jones* (the same lecture was given in Fredericton, New Brunswick in November 2012: see Robert J Sharpe, "The Persons Case and the Living Tree Theory of Constitutional Interpretation" (Viscount Bennett Memorial Lecture, delivered at the Faculty of Law, University of New Brunswick, 7 November 2012) [Sharpe, "Living Tree", unpublished]). I am indebted to him for this insight.

[131] *Jones*, *supra* note 1 at para 67.

[132] *Ibid*. See also Warren & Brandeis, *supra* note 18, in which the writers argued for the recognition of an actionable right to privacy under US tort law in response to perceived threats to privacy interests posed by the advent of photographic technology.

[133] *Jones*, *supra* note 1 at para 89.

[134] *Ibid* at para 69 [emphasis added].

[135] *Ibid*.

There is a strong focus on the harm that the plaintiff suffered and the cause of that harm (that is, the defendant's wrongful conduct). Clearly of great concern to Justice Sharpe is the need to provide Jones with a legal remedy for the wrong inflicted upon her by Tsige. This is the motivating factor, the "reason for action",[136] behind the recognition of the intrusion tort. Moreover, Justice Sharpe's judgment is concerned with imposing liability "based upon a general public sentiment of moral wrongdoing for which the offender must pay."[137] This reflects the (qualified) deontological impulse identified above.

Justice Sharpe's view that Ontario law would be "sadly deficient" if it did not provide Jones with a remedy mirrors Lord Atkin's concern that failing to recognize a general duty of care would be a "grave defect in the law ... so contrary to principle."[138] This statement of Lord Atkin's would not look out of place in Justice Sharpe's judgment. The latter's appeals to *Charter* and common law jurisprudence, to the case law of foreign jurisdictions, and to a range of academic commentary on the subject of privacy all point toward a strong concern about ensuring the design of a cause of action aimed at providing redress for an obvious "social wrong".[139] The obviousness of this social wrong becomes readily apparent when we consider matters such as the following. First, Warren and Brandeis' argument was motivated by the potential for technology-assisted intrusions into the private sphere.[140] Second, a substantial body of case law followed in the wake of their article in order to address the authors' concerns (spanning the four U.S. privacy torts) and continues to influence cases such as *Jones* and its New Zealand equivalent, *Holland*.[141] Third, a wealth of legislation designed to prevent abuses of electronic data-storage and communications technology has been enacted across many jurisdictions.

Since there is evidence that a commitment to corrective justice provides an underlying rationale for the *Jones* judgment, the new tort of intrusion upon seclusion appears designed to do exactly what we might expect from a new cause of action within that branch of the law. At the outset of this paper, I noted the relevance of imagination to Justice Sharpe's methodology and discussed this and the role played by a commitment to

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136 On reasons for action in deontological moral theory, see Richard Mullender, "Privacy, Paedophilia and the European Convention on Human Rights: A Deontological Approach" (1998) PL 384 at 386.

137 *Donoghue*, *supra* note 126 at 580.

138 *Ibid* at 582.

139 *Ibid* at 583.

140 See Warren & Brandeis, *supra* note 18 at 195.

141 *Supra* note 33.

corrective justice within *Jones*. Yet it is necessary to seek to uncover more about Justice Sharpe himself in order to better understand what factors may have motivated him to engage in this development of the law. What is it about *this* judge that led him to do what judges in England and Australia have long shied away from? In the next section, I will explore Justice Sharpe's judicial and extra-judicial work, seeking thereby to understand more about the man who is the first Canadian judge at the appellate level to make such a development.

3. Justice Sharpe: An Academic Judge

I have already noted how, in developing the common law, Justice Sharpe is untroubled by existing authorities that are (at best) inconclusive[142] and even (in one case) hostile[143] to the notion that a tort of privacy could be recognized, preferring to rely on *Charter* values supplemented by an appeal to corrective justice. In order to understand more fully why he does so, we need greater analytic purchase on his judgment; to gain this, we might usefully follow his own advice. Giving a public lecture in London in May 2012, Justice Sharpe advised legal scholars to always seek to understand the individuals behind cases and their decisions, the better to comprehend those decisions.[144] I shall therefore now consider some of his judicial and extra-judicial work.

Justice Sharpe is himself a legal historian who has had a distinguished academic career.[145] In his extra-judicial academic work, Justice Sharpe has contributed significantly to the understanding of a key aspect of Canadian constitutional law: the principle established in the so-called *Persons Case*.[146] The issue at the heart of the case was whether women were eligible to be appointed to the Senate under section 24 of the *Constitution Act, 1867*, which provided only that "persons" could be appointed.[147] When the matter was considered by the Supreme Court of Canada, it was

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142 See *Saccone*, *supra* note 51; *Roth*, *supra* note 51; *Krouse*, *supra* note 51; *Athans*, *supra* note 48.

143 See *Euteneier*, *supra* note 39.

144 See Sharpe, "Living Tree", *supra* note 130.

145 For brief biographical information on Justice Sharpe, see "Brief Biographical Note of Justice Robert J. Sharpe", online: Court of Appeal for Ontario <www.ontariocourts.ca/coa/en/judges/sharpe.htm>.

146 *Edwards v Attorney-General for Canada*, [1930] AC 124, [1930] DLR 98 (PC) [*Persons Case*]. See Robert J Sharpe & Patricia I McMahon, *The Persons Case: The Origins and the Legacy of the Fight for Legal Personhood* (Toronto: University of Toronto Press, 2007).

147 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 24, reprinted in RSC 1985, App II, No 5.

held that women were not eligible under the statute.[148] On appeal to the Judicial Committee of the Privy Council (at that time, the highest appellate court for Canadian cases), this decision was reversed. In holding that women were indeed eligible, the Privy Council expounded a new method for constitutional interpretation that has come to be known by the name given to it by Lord Sankey: the "living tree" approach.

Essentially, this method recognizes that a country's constitution is a living document that must be interpreted in the context of the contemporary social and political realities of the day. It is anti-formalist. The Privy Council's decision in the *Persons Case* is noteworthy both for this approach and for eschewing a string of English authorities (which had been relied upon by the Supreme Court of Canada when it considered the matter)[149] that pointed to the conclusion that women were not eligible to serve on the Senate. The living tree approach has become, since Canada's independence and the emergence of the Supreme Court in its modern form, the accepted, primary method for the interpretation of constitutional documents, including the Canadian *Charter*. From his extra-judicial writing and lecturing, it is clear that Justice Sharpe immensely approves of the method and that he wholeheartedly endorses the remarkable step taken by Lord Sankey in inventing it.[150] Indeed, as Lord Dyson informally observed at the conclusion of Justice Sharpe's lecture, the latter appears to regard Lord Sankey as something of a hero.[151]

Another judge upon whom Justice Sharpe has dwelt in his extra-judicial writing is former Supreme Court of Canada Chief Justice Brian Dickson, "arguably the leading modern exponent of the living tree metaphor."[152] Given Justice Sharpe's admiration for Lord Sankey's "invention", it is unsurprising that he highlights the work of the judge he considers its greatest modern exponent. Justice Sharpe's extra-judicial treatment of Chief Justice Dickson's legacy is found in a biography and several articles concerning the legacy of the man for whom Justice Sharpe himself had clerked in his early career.[153] (It is also, of course, Chief Justice Dickson's

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148 *Reference Re Meaning of Word "Persons" in s 24 of the BNA Act*, [1928] SCR 276 at 282–90 (available on CanLII).

149 *Ibid*.

150 Sharpe & McMahon, *supra* note 146 at 181.

151 At the Institute of Advanced Legal Studies, during questions following Justice Sharpe's public lecture (Sharpe, "Living Tree", *supra* note 130). Lord Dyson was hosting the event on behalf of the Statute Law Society.

152 Sharpe & McMahon, *supra* note 146 at 205.

153 See Robert J Sharpe & Kent Roach, *Brian Dickson: A Judge's Journey* (Toronto: University of Toronto Press, 2003); Justice Robert Sharpe, "Brian Dickson, The Supreme Court of Canada, and the *Charter of Rights*: A Biographical Sketch" (2002) 21 Windsor

decision in *Hunter*[154] that provides one of the few authorities Justice Sharpe relies on in *Jones* when mobilizing his *Charter* values argument.) We can but briefly flag up a key aspect of Chief Justice Dickson's legacy, of which Justice Sharpe notably approves and which is, indeed, reflected in *Jones*.

Justice Sharpe credits the former Chief Justice with playing "an important role in taking Canadian law out from the shadow of formalism."[155] Formalism, which Justice Sharpe observes the Supreme Court of Canada suffered from prior to Chief Justice Dickson's appointment to its panel,[156] is a legal method both Dickson and Sharpe have rejected. Chief Justice Dickson "cautioned against unduly formal judgments that 'overemphasize precedents and case law'."[157] Justice Sharpe cites Chief Justice Dickson's observation that "[a] good legal argument 'is essentially an attempt to justify a certain conclusion through an appeal to reason and principle'."[158] This sort of reasoning is anti-formalist and fits with a notion of *ex post facto* rationalization, which mirrors the idea postulated in this essay that, prior to his exercise of legal imagination, Justice Sharpe was spurred to act in *Jones* by an essentially deontological moral impulse to give effect to corrective justice.[159]

We ought also to consider Justice Sharpe's own judicial history. He is no stranger to making substantial developments in tort law in order to advance protection for significant interests.[160] One case in particular is worthy of note. In *Cusson v. Quan*, Justice Sharpe gave the lead judgment for the Ontario Court of Appeal, in which he recognized a "responsible

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YB Access Just 603 [Sharpe, "Biographical Sketch"]; Robert J Sharpe, "The Constitutional Legacy of Chief Justice Brian Dickson" (2000) 38:1 Osgoode Hall LJ 189; The Honourable Mr Justice Robert J Sharpe, "Brian Dickson: Portrait of a Judge" (1998) 17:3 Advocates' Soc J 3.

154 *Supra* note 100, Dickson J (as he then was).

155 Sharpe, "Biographical Sketch", *supra* note 153 at 617.

156 *Ibid* at 616.

157 Brian Dickson, "Address to the Canadian Institute for the Administration of Justice Seminar on Judgment Writing" 2 July 1981, NAC vol 138 file 28, quoted in Sharpe, "Biographical Sketch", *supra* note 153 at 618.

158 *Ibid*.

159 On this sort of non-linear reasoning, see Posner: "Some judges ... start ... by asking themselves what outcome ... would have the best consequences. Only then do they consider whether that outcome is blocked by the orthodox materials of legal decision making" (*supra* note 56 at 84).

160 See Dolding & Mullender, *supra* note 8 at 12. When Dolding and Mullender talk of "significant interests", they have in mind "those goods which constitute necessary, if not sufficient, conditions of [our] leading autonomous lives" (*ibid*, n 2).

journalism" defence in a defamation case for the first time in Canada.[161] The recognition of this defence was, technically, entirely *obiter* since Justice Sharpe concluded that the appellants were unable to avail themselves of this new defence on the facts. However, his reasoning was detailed and lengthy and it subsequently found express approval in *Grant v. Torstar* from both the Ontario Court of Appeal[162] and the Supreme Court of Canada.[163] The Supreme Court also accepted this analysis when it heard the appeal of *Quan* from the Ontario Court of Appeal.[164] Justice Sharpe's approach to the recognition of the "responsible publication" defence in *Quan* is strikingly similar to his method in *Jones*.

In *Quan*, Justice Sharpe was faced was competing interests: the appellants' (and media bodies' generally) interest in free speech versus the respondent's interest in his good reputation. Justice Sharpe considered that the traditional defence of qualified privilege[165] failed to afford sufficient protection for free speech interests. However, the appellants had based one of their two lines of argument in part around the English cases *Reynolds* and *Jameel*,[166] in which the House of Lords first recognized and then refined a defence of "responsible journalism"[167] (usually known in England

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161 2007 ONCA 771, 87 OR (3d) 241 [*Quan*]. *Quan* concerned the publishers of articles that were allegedly defamatory of the respondent-plaintiff Cusson. In the immediate aftermath of the attack on the World Trade Centre of September 11, 2001, Cusson, a police officer serving in the Ontario Provincial Police, travelled of his own volition to New York to assist in search-and-rescue operations. The gist of the defamatory articles published by the *Ottawa Citizen* was that the "renegade" Cusson had misled the New York police about his background and had jeopardized the operations. The appellants, the authors of the article, attempted to raise various defences, including justification (truth) and qualified privilege. The trial judge held that despite the articles being of public interest, the defence of qualified privilege was not available since there was no "compelling, moral or social duty" to publish them (*ibid* at para 5). The jury found the defendants liable for some of their allegations, which they found not to be justified. On appeal, the appellants argued that either (a) traditional qualified privilege ought to be extended to provide a defence for media publications on all matters of public interest (*ibid* at para 30), or that (b) a novel defence of public interest publication ought to be recognized (*ibid* at para 31). Justice Sharpe ultimately accepted the second line of argument.

162 *Grant v Torstar Corp*, 2008 ONCA 796 at para 28, 92 OR (3d) 561.

163 *Torstar*, *supra* note 96 at para 21.

164 *Quan v Cusson*, 2009 SCC 62 at paras 25–27, [2009] 3 SCR 712.

165 For an explanation of the defence of qualified privilege, see *Quan*, *supra* note 161 at paras 38–40.

166 *Reynolds v Times Newspapers Ltd* (1999), [2001] 2 AC 127, [1999] 3 WLR 1010 [*Reynolds* cited to AC]; *Jameel v Wall Street Journal Europe*, [2006] UKHL 44, [2007] 1 AC 359.

167 *Reynolds* provides a defence for a publisher of potentially defamatory material on a matter in the public interest so long as the publisher satisfies the court that he has engaged in "responsible journalism". Ten exemplary factors indicative of "responsible

simply as "the *Reynolds* defence"[168]). Justice Sharpe examined a range of defences protecting public interest journalism from around the common law world, including the *Reynolds*/*Jameel* approach. Having surveyed cases from the United States, England, New Zealand, Australia, and South Africa, Justice Sharpe noted that "the evolution away from the common law's traditional bias in favour of the protection of reputation is strikingly uniform."[169] He concluded that Ontario ought indeed to recognize a "responsible publication" defence, and that such recognition would amount to an incremental step in the development of defamation law. He also made an appeal to *Charter* values as a justification for this step:

> Our task, it seems to me, is to interpret and apply the earlier decisions in light of the *Charter* values at issue and in light of the evolving body of jurisprudence that is plainly moving steadily towards broadening common law defamation defences to give appropriate weight to the public interest in the free flow of information.[170]

Aspects of *Quan* are deeply controversial—arguably more so even than the decision in *Jones*. For in *Quan*, Justice Sharpe was faced with a much stronger line of authority hostile to the proposed new defence. Indeed, it was argued on the part of the respondent that the Supreme Court's ruling in *Hill v. Church of Scientology* precluded the adoption of an expanded qualified privilege defence.[171] This is a plausible reading of *Hill*, although it is not a reading that appears to have found great support amid the academic community in Canada.[172] Moreover, Justice Sharpe explicitly recognized that he must respect the Supreme Court's ruling in *Hill*. However, he went on to state that respecting it meant, in this instance, limiting "[a]ny adjustment of the common law [to one which is] incremental in nature."[173] More controversial still was Justice Sharpe's assertion that "*Hill*

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journalism" were set out by Lord Nicholls. These include matters relating to the manner in which information on the issue was acquired, the lengths to which the defendant has gone to establish the veracity of the matter, and the manner in which the material is presented when published (*Reynolds*, *supra* note 166 at 205). The *Reynolds* defence will be abolished in England the *Defamation Act 2013* when the *Act* comes into force (*Defamation Act 2013* (UK), c 26, s 4). It will be replaced by an ostensibly similar defence for "publication on a matter of public interest" (*ibid*, s 7).

168 Mullender notes that *Reynolds*-like defences have been adopted in defamation law across much of the common law world (in Australia, New Zealand, and South Africa, as well as the United Kingdom and Canada). See Richard Mullender, "Defamation and Responsible Communication" (2010) 126 Law Q Rev 368 at 370–71.

169 *Quan*, *supra* note 161 at para 122.

170 *Ibid* at para 133.

171 *Hill*, *supra* note 104.

172 See Emily Luther, "Case Comment on *Cusson v. Quan*" (2009) 72:2 Sask L Rev 295 at 307, 314–15.

173 *Quan*, *supra* note 161 at para 132.

was decided before *Reynolds* and *must be read in the light of its facts and the jurisprudential issue it posed*."[174] Further, "[t]he conclusions in *Hill* must be read in the context of the case that was before the Supreme Court and, when read in that light, fall well short of a categorical ruling that would preclude reconsideration of the law of defamation in light of *Charter* values."[175]

In *Quan*, Justice Sharpe staked out a remarkable role for the Ontario Court of Appeal. He essentially argued that it may, quite appropriately, review Supreme Court authority in the light of more recent cases from other jurisdictions and, combining those alien authorities with an appeal to *Charter* values, circumvent the higher court's decision.[176]

From the evidence I have considered, I can postulate several things about Justice Sharpe. He is a judge who does not shy away from controversial decisions, particularly where he considers that the interests of justice require judicial intervention. Indeed, he consistently stakes out roles for the court, both in his judicial and extra-judicial work, that might be described as activist; yet Justice Sharpe's "activism" amounts to nothing more sinister than wide incrementalism,[177] which is principled and therefore legitimate. It is little wonder, then, that when faced with common law precedents that are inconclusive as to whether intrusion upon private life is capable of attracting tortious liability, Justice Sharpe embraces the broad scope to develop such a tort that is afforded by reliance upon higher-order law in the form of *Charter* values.

Having examined Justice Sharpe's background as a judge and an academic, I will now turn to consider whether the development that he propounds in *Jones* really is incremental in nature. For if it is not, that decision will be open to entirely legitimate criticism on the ground that it oversteps the court's role and encroaches into the territory of the legislature.

4. Incrementalism

> Tsige argues that it is not open to this court to adapt the common law to deal with the invasion of privacy. ... It is submitted that ... any expansion of the law relating to the protection of privacy should be left to Parliament and the legislature.[178]

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[174] *Ibid* at para 138 [emphasis added].

[175] *Ibid*.

[176] See Luther, *supra* note 172.

[177] See *Quan*, *supra* note 161 at paras 131–32, 139; *Jones*, *supra* note 1 at para 65.

[178] *Ibid* at para 48.

New legal rules are shaped by those who create them.[179] When judges expand the common law, by creating or "recognizing" new causes of action, they engage in institutional design.[180] One of the arguments often made against the judicial recognition of a novel head of liability is the assertion that courts ought to confine themselves to the application of existing legal rules and avoid the creation of new ones.[181] Taken to an extreme, this would mean that no legal development would ever take place at the hands of judges. While there are judges who would take such a view, they do not appear to be in the majority.[182] Rather, there is a broad consensus

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[179] Or by those who first "recognize" them and are thus able to define their parameters.

[180] See Thomas DC Bennett, "Corrective Justice and Horizontal Privacy: A Leaf out of Wright J's Book" (2010) 7 J Jurisprudence 545. On the challenges of tort design under the *HRA*, see Roderick Bagshaw, "Tort Design and Human Rights Thinking" in Hoffman, *supra* note 4, 110.

[181] See e.g. Frances Bennion, "A Naked Usurpation?" *New Law Journal* 149:6880 (19 March 1999) 421. Bennion draws a distinction between (legitimate) "judicial" and (illegitimate) "legislative" law-making by the courts. More recently, Phillipson and Williams have drawn a similar distinction between the two concepts (*supra* note 5 at 887). However, just how a "judicial" style of law-making might be readily distinguished from a "legislative" style remains a question to which answers are regrettably elusive. Phillipson and Williams explain that (incremental) judicial (unlike legislative) law-making involves judges making law "on a piecemeal and principled basis that takes due account of pre-existing legal frameworks" (*ibid* at 887), but that "it will inevitably sometimes be a matter of legitimate debate as to whether a proposed change is incremental or not" (*ibid* at 907). Their notion echoes part of Lord Goff's judgment in *Kleinwort Benson Ltd v Lincoln CC (HL(E))*, where he stated:

> When a judge decides a case which comes before him, he does so on the basis of what he understands the law to be. ... In the course of deciding the case before him he may, on occasion, develop the common law in the perceived interests of justice. ... This means not only that he must act within the confines of the doctrine of precedent, but that the change so made must be seen as a development ... of existing principle and so can take its place as a congruent part of the common law as a whole ([1999] 2 AC 349 at 378, [1998] 3 WLR 1095).

Statements such as these are, however, regrettably indeterminate; they do not help draw a precise line between legitimate and illegitimate judicial law-making. As Lord Goff went on to state, "[o]ccasionally, a judicial development of the law will be of a more radical nature, constituting a departure, even a major departure, from what has previously been considered to be established principle, and leading to a realignment of subsidiary principles within that branch of the law" (*ibid*). Likewise in Canada, "[n]o test has yet been proffered [by the courts] in terms of what is too 'dramatic' or 'complex' for judicial elaboration within the common law" (John DR Craig, "Invasion of Privacy and *Charter* Values: The Common-Law Tort Awakens" (1997) 42:2 McGill LJ 355 at 374). As such, they actually *invite* precisely the debate Phillipson and Williams tell us will be inevitable.

[182] Antonin Scalia is identified by Posner as a particularly conservative judge in this respect. See Antonin Scalia, "The Rule of Law as a Law of Rules" (1989) 56:4 U Chicago L Rev 1175.

that judges do quite legitimately have a role to play in the development of new legal rules.[183] The debate is over the extent of that role.

"Incrementalism" is the term coined by common lawyers to describe the piecemeal process by which judges may legitimately develop the law. It takes cognizance of existing legal rules while justifying the recognition (or creation) of new ones. Dolding and Mullender define incrementalism generally as "a form of adjudication involving the articulation of liability rules which are, at once, *new* (and, hence, can properly be regarded as the fruit of judicial law-making) and yet are *conditioned* by pre-existing law."[184]

Scrutiny of *Jones* reveals it to have been the result of legitimate incremental development, rather than of legislature-usurping activism. Support for this conclusion can be found by making reference to two theories of incrementalism. The first, coined by Craig, draws a useful distinction between what he calls the "principled approach" to common law development and what I will call the "rigid categorical approach".[185] The second, espoused by Dolding and Mullender, draws a not-dissimilar distinction between "wide" and "narrow" forms of incrementalism, respectively.[186]

Craig identifies the principled approach to common law development as one whereby courts, when developing new causes of action (in tort law, for example), may go so far as to create new categories of torts in order to give effect to overarching principle.[187] In giving effect to principle, the court is able to protect "significant interests" such as privacy.[188] The prin-

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183 The literature expressing such a view is voluminous. See e.g. Kent Greenawalt, "Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges" (1975) 75:2 Colum L Rev 359; Benjamin N Cardozo, "Lecture III: The Method of Sociology: The Judge as Legislator" in *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921) 98 at 140. See also Karl N Llewellyn, *The Bramble Bush: The Classic Lectures on the Law and Law School* (New York: Oxford University Press, 2008) at 41; HLA Hart, *The Concept of Law*, 3d ed (Oxford: Clarendon, 1961) at 134–35.

184 Dolding & Mullender, *supra* note 8 at 13.

185 See Craig, *supra* note 181 at 362.

186 See Dolding & Mullender, *supra* note 8.

187 So, to use an English example, Craig would see the House of Lords' effective creation of a strict liability tort for escape of dangerous substances in *Rylands v Fletcher* as being an instance of the principled approach to incremental development ((1868), 3 LR 330, [1861–73] All ER Rep 1 HL (Eng)); existing categories of nuisance afforded the plaintiff no remedy, and so a new category was fashioned.

188 Dolding & Mullender, *supra* note 8 at 12. Given the definitions of privacy expounded by Bloustein, Benn, and Gross, we can plausibly conclude that privacy interests would fit within the notion of a "significant interest" espoused by Dolding and Mullender. See Edward J Bloustein, "Privacy as an Aspect of Human Dignity: An Answer to Dean

cipled approach therefore has much in common with Dolding and Mullender's wide incrementalism. The creation of a new category of tort (to plug a gap in, for example, rights protection) can give effect to tort's "protective purpose", by which Dolding and Mullender seem to have in mind a notion essentially identifiable as the ideal of corrective justice.[189] In short, the wide incremental (or principled) approach legitimizes the court's having regard to overarching principles in order to found novel causes of action, either in the complete absence of precedent, or where there are only hostile or unhelpful authorities.[190]

There are, then, two (not mutually exclusive) levels at which this notion of "principle" can exist. It can exist—as Craig finds in Canada—in the form of a *Charter* value–type principle, a value belonging to a *particular* legal system.[191] And it can also exist at a still deeper level (as Dolding and Mullender seem to envisage it), as a principle *of tort law itself*. Thus Craig tells us that the *Charter* values adjudicative method is "part and parcel of the principled approach."[192]

Drawing out these two levels adds greater clarity to the position that "principle" occupies within the wide incremental method. I would separate this notion of "principle" into two classes: "values" and "overarching principles". A *Charter* value is a "value" type of principle: a judicial recognition that a *particular* interest (in this instance, the right to privacy) is weighty and important. Corrective justice (or Dolding and Mullender's "protective purpose") is an "overarching principle", for it derives not from the recognition of a *particular* interest as bearing value, but from a more abstract notion that "significant interests" (that is, not necessarily those currently recognized by the legal system as "values" in themselves) warrant the protection of tort law. After all, the principle of corrective justice gives expression to the broad notion that individuals who suffer harm as a result of the wrongful conduct of others deserve a remedy. Thus I add to Dolding and Mullender's theory by drawing from it these two classes of principle

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Prosser" (1964) 39 NYUL Rev 962 at 971; Stanley I Benn, "Privacy, Freedom, and Respect for Persons" in J Roland Pennock & John W Chapman, eds, *Privacy: Nomos XIII* (New York: Atherton, 1971) 1; Hyman Gross, "The Concept of Privacy" (1967) 43 NYUL Rev 34 at 35–36.

189 Dolding & Mullender, *supra* note 8 at 14. See also Craig, *supra* note 181 at 373.

190 This does not necessarily require courts to disregard precedent. If an appellate court is dealing with unhelpful or hostile precedent, it may legitimately overrule decisions of lower courts. Wide incrementalism ought not to be taken as seeking to legitimize a lower court overruling the decision of a higher court (but see Sharpe JA's ruling in *Quan*, *supra* note 161).

191 Craig, *supra* note 181 at 358–61.

192 *Ibid* at 373.

that I consider to be implicitly relevant to their model of wide incrementalism. For if courts may consider the need to protect significant interests to be an "overarching principle" that ought to inform the development of novel liability rules, equally courts may take into account those *particular* interests ("values") which have already been judicially recognized as important (albeit the law lacks existing heads of liability apt to protect particular aspects of them).

While such an approach is controversial, both Craig and Dolding and Mullender are clearly of the view that it is readily classifiable as incremental. As such, it falls within the realms of judicial law-making. Following such a method enables a judge in Justice Sharpe's position to avoid "the potential criticism that the judicial recognition of a general privacy tort would be encroaching on the legislative field."[193]

This is not to say, however, that this wide approach is always favoured by courts, or that its use is consistent.[194] Indeed, Dolding and Mullender's article is born out of the inconsistencies they perceive in the approach to the incremental development of English tort law by the courts, whereby courts have, at various times, adopted both wide and narrow versions of incrementalism.

Craig gives the name "principled approach" to one method that he then contrasts with another, unnamed method, describing it as featuring a rigid adherence to existing categories of torts. As such, the competing method he describes by its features is by implication an opposite methodology to the principled approach; in this method, courts only develop new instances of liability where novel cases can be analogized to existing precedents *within* existing categories of torts. It is appropriate for us to label this the "rigid categorical approach" to incremental development, since, quite simply, it seeks to "confine the law to rigid ... categories."[195] In other words, the courts must apply existing law formalistically; all novel claims must be fitted into existing categories, or no liability will be imposed. Courts have no need to look to overarching principles. As such, Mullender points out that "[t]his [sort of] doctrine-bound approach to adjudication reduces receptivity to strongly novel claims."[196] This approach is substantially similar to Dolding and Mullender's narrow incrementalism, whereby in a novel case a judge must establish "a *tight* analogy between the facts before [her] and a set of circumstances which engage an existing liability rule":

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193 Craig, *supra* note 181 at 373–74.

194 See Mullender, "English Negligence Law", *supra* note 89 at 326–28.

195 *Donoghue*, *supra* note 126 at 594.

196 Mullender, "English Negligence Law", *supra* note 89 at 326.

> One way of expressing this difference between narrow and wide incrementalism is to note that while judges operating in the wide incrementalist mode look to presently existing doctrine for *guidance* as to the nature of the wrongful transactions comprehended by the law, they do not exhibit the degree of *doctrine-boundness* manifested by judges engaged in the practice of narrow incrementalism.[197]

So, wide incrementalism shuns "the requirement that the facts of a novel claim have to be comprehended by an existing category of case in order to ground a cause of action" that is indicative of narrow incrementalism.[198] Wide incrementalism is not, however, simply an academic concept. As Dolding and Mullender point out, this is a very real approach to judicial elaboration of the law that can be seen in the decisions of the highest domestic courts.[199] As such, it is a model of incrementalism which has received significant (if inconsistent) judicial affirmation. This suggests that, at the very least, it cannot be dismissed as illegitimate. Moreover, what I suggest is that, when appealing to principle in utilizing the wide incremental methodology, courts generally may legitimately appeal to either of what I have termed "values" or "overarching principles" and use them to drive forward development of the law.

Looking at Justice Sharpe's judgment in *Jones*, we can locate substantial evidence that the approach he takes closely matches the "wide incrementalism" (or "principled approach") model. Justice Sharpe recognizes a new category of tort, intrusion upon seclusion, rejecting Tsige's argument that it is not open to the court to do so. We have already noted the extent to which Justice Sharpe is untroubled by *Euteneier v. Lee* and by the lack of precedent allowing Ontario law to establish an action for invasion of privacy.[200] Justice Sharpe's strong focus on the perceived need to provide redress for a deserving claimant who suffered harm to a significant interest (privacy) as a result of a wrongful act by the defendant (her intrusive conduct) also evidences a desire to give effect to the ideal of corrective justice, tort law's protective purpose. Further, Justice Sharpe's decision to appeal to the higher-order *Charter* value of privacy as a justification for the recognition of a new category of tort, rather than to dwell on the limited existing doctrine, indicates that he perceives incrementalism as embracing, and allowing for, a wide approach. Here, then, we have seen in Justice Sharpe's judgment a wide incremental approach to common law development which features an appeal to two distinct underlying princi-

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197 Dolding & Mullender, *supra* note 8 at 16–17.

198 *Ibid* at 32.

199 *Ibid* at 28.

200 See Subsection I.D.1., "*Charter* values", above.

ples: privacy as a *Charter* value and the need to carry out corrective justice in this particular instance.

E. Corrective Justice, Tort Theory, and Privacy More Generally

Richard Mullender has argued that, particularly in England, tort law can be said in general to be informed by a qualified deontological moral philosophy.[201] Tort law has also frequently been said to pursue corrective justice.[202] We have seen that Justice Sharpe's judgment in *Jones* exhibits both of these impulses, as we might expect (assuming the correctness of my arguments). I can also use the foregoing analysis to support a slightly more generalized claim: that a particular concept of corrective justice, as an ideal, lies at the heart of this new branch of Ontario tort law. In so doing, I can contribute to a wider debate involving tort theory.

Corrective justice is, as I have noted, espoused as a theory of tort's underlying ideal by a number of legal philosophers, including, among others, Weinrib, Coleman, Perry, and Wright. They do not all agree on a common conceptualization of corrective justice, but I might briefly add a little value to the as-of-yet unresolved debate among their positions. The debate has often been carried on "at a high level of formal abstraction," where the positions staked out are only loosely tied to particular causes of action.[203] Moreover, the examples that are utilized tend to be broad; Weinrib and Coleman both dwell on matters pertaining to paradigm instances of negligence.[204] *Jones* gives us the opportunity to hold up these broadly exemplified theories and assess their validity in the light of the new privacy tort of intrusion upon seclusion. In other words, we have seen how the pursuit of corrective justice features in Justice Sharpe's reasoning. We ought now to ask whether a concept of corrective justice can adequately account more broadly for the protection that tort law provides against intrusions upon individuals' privacy.

Perry has produced a helpful taxonomy of corrective justice theories.[205] Of the two main categories he identifies, the first, "annulment", may be discounted for reasons which, although not relevant to this essay, are elu-

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[201] Mullender, "Common Law Culture", *supra* note 90 at 308.

[202] See Coleman, "Mixed Conception", *supra* note 117; Weinrib, "Morality", *supra* note 117; Gardner, *supra* note 125.

[203] Wright, *supra* note 117 at 628.

[204] See Weinrib, "Morality", *supra* note 117; Coleman, "Mixed Conception", *supra* note 117.

[205] See Perry, "Moral Foundation", *supra* note 117.

cidated by Perry in the course of his.[206] This leaves us with the second, "reparation", category of theories to examine.[207] Perry explains that theories in the "reparation" category

> regard corrective justice as involving a limited moral relationship that holds only between injurer and victim. Under certain circumstances one person who injures another has an obligation owed specifically to the victim to compensate for the harm caused; the victim has a correlative right against the injurer to receive compensation, but no similar right against anyone else.[208]

Within the "reparation" category, Perry locates three sub-categories of the corrective justice theory:

> Arguments of the first type attempt to reduce reparation to restitution: *A* has come into possession of something that belongs to *B* and hence must give it back. Arguments of the second type start with the fact that a loss has occurred, and are based on a kind of localized distributive justice: *B* has experienced a loss which is transferrable but which will nonetheless have to be shouldered by someone; as between *A* and *B* it is morally preferable that the loss be borne by *A*, since she is the person who (wrongfully) caused it in the first place; *A* should therefore be fixed with an obligation of reparation, the effect of which will be to "redistribute" the loss to her. ... Arguments of the third type focus on the normative implications of voluntary action: *A* has acted, perhaps wrongfully, and as a result of that action *B* has been injured; one of the appropriate normative incidents of *A*'s (wrongful) conduct is that she should pay compensation to *B*.[209]

The first argument, which reduces reparation to restitution, does not fit well with an intrusion-type privacy tort. In an intrusion scenario, *A* does not come into possession of anything belonging to *B*; nor could *A* return anything to *B* that had been taken (or otherwise acquired). The harm at

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[206] Perry is a strong critic of Coleman's "annulment" theory, whereby "wrongful (or unwarranted) gains and losses should be eliminated or annulled" (Perry, "Moral Foundation", *supra* note 117 at 449; see Jules L Coleman, "Tort Law and the Demands of Corrective Justice" (1992) 67:2 Ind LJ 349). Coleman himself subsequently retreated from this theory (see Coleman, "Mixed Conception", *supra* note 117). Perry criticizes the annulment theory on the ground that it is mislabelled; "the core concern of the annulment theory is, in the end, distributive rather than corrective justice" (Perry, "Moral Foundation", *supra* note 117 at 450). Assuming the correctness of Perry's criticism of Coleman's original thesis, we can discount it from our analysis since it does not truly represent a version of corrective justice.

[207] Ernest Weinrib presents the "best known theory" of corrective justice in its "reparation" form, according to Perry (*ibid* at 449). See Weinrib, "Morality", *supra* note 117.

[208] Perry, "Moral Foundation", *supra* note 117 at 449.

[209] *Ibid* at 451. This framework is not exhaustive—indeed, it omits Perry's own preferred theory, the "volitionist/distributive" argument, which he goes on to advocate—yet for our purposes it provides a useful model with which to examine the *Jones* tort.

the heart of an intrusion upon seclusion is not the wrongful taking of anything in which *B* had a possessory interest.

The second argument could fit with an intrusion-type scenario, but it is not a neat fit. It fails to account for the extent to which, in *Jones* as in *Donoghue*, the normative consideration of the "wrongfulness" of the defendant's action fixes the compensatory obligation to the defendant, instead of attaching the obligation to another party with deep pockets and some connection to the events, to whom a degree of fault might conceivably be attributed (such as the Bank of Montreal in *Jones*, or the shopkeeper in *Donoghue*).

It is thus the third argument (which, for ease of reference, we will call the "normative argument") that, placing the normative implications of the defendant's voluntary action at the heart of the matter, fits best with an intrusion-type privacy tort. Certainly, it fits well with Justice Sharpe's focus on the repugnancy of the defendant's conduct in *Jones*, and with the link that he clearly draws between that wrongful conduct and the imposition of an obligation upon the defendant to make reparation.

Moreover, the normative argument lends itself more cogently than the others to explaining the claimant's recovery of damages for intangible types of loss.[210] Where the harm suffered by the plaintiff is an intrusion, as in *Jones*, it is difficult to quantify damages.[211] Jones claimed that her privacy interest in her banking records had been "irreversibly destroyed" by Tsige's conduct.[212] It must also be considered that in many intrusion-type scenarios, the "loss" suffered typically involves "intangible harm such as hurt feelings, embarrassment or mental distress, rather than damages for pecuniary losses."[213] This is not the place in which to rehearse the complex debate as to the "true" nature or measure of harm in privacy cas-

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[210] That is not to say that all privacy violations are immeasurable or unquantifiable; in England, where privacy interests are often protected through recovery for a breach of confidentiality, quantification of damages (while often a difficult exercise) might be analogized, for present purposes, to interference with property rights. If one considers that a major portion (not necessarily the entirety) of the harm at the heart of a breach of confidentiality is the interference with the claimant's right to exercise control over the information that is the subject of the confidence, then the harm at least becomes measurable (by considering, for example, the extent to which the claimant can recover control, the extent of dissemination of the information, and so forth).

[211] Indeed, Justice Sharpe devotes fifteen paragraphs (plus an appendix) of his judgment to the assessment of damages (*Jones*, *supra* note 1 at paras 74–88, 90).

[212] *Ibid* at para 7.

[213] *Ibid* at para 77. On the psychological harm satisfying the "harm" element common to both defamation and privacy actions in England, see Alastair Mullis & Andrew Scott, "Reframing Libel: Taking (All) Rights Seriously and Where It Leads" (2010), online: LSE Working Papers 20/2010 <www.lse.ac.uk/collections/law/wps/WPS2010-20_MullisandScott.pdf>.

es generally. Suffice it to say that there is no real academic consensus as to *why* privacy violations are "wrongs" deserving of legal sanctions, though there is plenty of support for the notion that such violations are, in fact, wrongs.[214] Most useful for our purposes are theories of scholars such as Edward Bloustein and Stanley Benn (who advocate privacy as embracing "personality" and "personhood", respectively)[215] and Hyman Gross, who locates the relevant harm in privacy cases as the loss of the ability to control access to "the affairs of [one's] life which are personal."[216] The normative argument is sensitive to the reality that intrusions upon the seclusion of an individual occasion damage that cannot be easily measured or quantified. It is noteworthy that Justice Sharpe considers the English case of *Mosley* to be one of intrusion when it has been treated by English scholars (and, indeed, by the trial judge, Mr. Justice Eady) as an informational tort case.[217] However, Justice Sharpe is unequivocal when he states that *Mosley* is one of a class of claims "that would easily fall within the intrusion upon seclusion category."[218] The claimant in *Mosley*, the Formula 1 racing supremo Max Mosley, has spoken publicly of the impossibility of recovering lost privacy,[219] and the artificiality of the exercise of fixing damages in his case was not lost on the trial judge.[220]

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[214] See Solove, *supra* note 77. Solove surveys the various theories of harm in privacy cases, concluding that none is entirely satisfactory. In solution to this, Solove proposes reconceptualizing privacy entirely from the "bottom-up", so as to recognize a very broad range of potential violations as being legal wrongs (*ibid* at 40). Solove's solution would still embrace the definitions of privacy offered by Bloustein, Benn, and Gross, but would not be limited to them.

[215] See Bloustein, *supra* note 188; Benn, *supra* note 142.

[216] Gross, *supra* note 188 at 36 [emphasis removed].

[217] *Mosley v News Group Newspapers Ltd*, [2008] EWHC 1777 (QB) (available on BAILII) [*Mosley*]. In *Mosley*, the claimant brought an action for unauthorized disclosure of personal information and breach of confidence in respect of intrusive photographs and video footage. The offending material, which was of a sexual nature, was published by the (now defunct) tabloid *The News of the World*. Giving judgment for the claimant, and awarding a record sum of £60,000 in damages, Eady J stated that "the very fact of clandestine recording may be regarded as an intrusion and an unacceptable infringement of Article 8 [privacy] rights" (*ibid* at para 17). The crux of Mosley's pleaded complaint, however, was the publication rather than the acquisition of the offending material. See e.g. Angus McLean & Claire Mackey, "How Sadomasochism Changed the Face of Privacy Law: A Consideration of the Max Mosley Case and Other Recent Developments in Privacy Law in England and Wales" (2010) 32:2 Eur IP Rev 77; Nicola McCormick & Lily Riza, "Privacy—The Bottom Line" (2008) 19:8 Entertainment L Rev 178.

[218] *Jones*, *supra* note 1 at para 62.

[219] Max Mosley has given evidence to the Culture, Media and Support Select Committee (UK Parliament House of Commons) and to the Leveson Inquiry into the Culture, Practice and Ethics of the Press on this matter. His memorandum to the Select Committee is available at "Memorandum submitted by Max Mosley", online: UK Parliament

Privacy cases are not paradigm tort cases; they do not lend themselves easily to application when developing and justifying an overarching theory of tort law, such as the ideal of corrective justice, in the abstract.[221] The harm at the heart of a privacy violation is unique, and the concept of privacy itself has proved exceptionally difficult to define.[222] Negligence law and nuisance law have provided more fertile and readily accessible ground for scholars in this respect. But a theory of tort law cannot be sustained merely by proving its applicability to paradigm cases. Privacy torts have, in the early years of the twenty-first century, become more commonplace in common law countries, and a plausible overarching theory of tort law ought to be able to account for them.[223] While this essay does not consider the applicability of the normative argument to privacy cases in great detail, I have at least been able to note that, of those identified by Perry as categories of corrective justice arguments, the normative argument most plausibly manages to explain and justify intrusion-type privacy torts. Thus I can contribute to the corrective justice debate in tort law more generally by suggesting that the normative argument has greater practical merit than those others that, while they accommodate paradigm torts (such as negligence, nuisance, or trespass/conversion), do not readily accommodate intrusion-type privacy claims.

Conclusion

Judges expose themselves to criticism when they recognize new causes of action. This is particularly true in those controversial cases where tort law is called to action to protect privacy. In such instances, media organizations frequently strongly oppose the enhancement of protection for individual rights.[224] As well, the argument that the judiciary is ill-suited to

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<www.publications.parliament.uk/pa/cm200910/cmselect/cmcumeds/memo/press/ucps4302.htm>. Transcripts of his evidence to the Leveson Inquiry are available at "Witness Statement of Max Rufus Mosley", online: The Leveson Inquiry <www.levesoninquiry.org.uk/evidence/?witness=max-mosley>. In particular, see para 72 of Mosley's witness statement to the Leveson Inquiry, where he asserts that "once published, the [private] information will never again be private."

220 See *Mosley*, *supra* note 217 at para 236. The difficulties privacy intrusions present for assessing quantum of damages is considered usefully in Kirsty Hughes, "Privacy Injunctions: No Obligation to Notify Pre-Publication" (2011) 3:2 Journal of Media Law 179.

221 See Bennett, *supra* note 180 at 554–58.

222 See Solove, *supra* note 77, ch 1–2.

223 See e.g. the creation of a privacy tort by the New Zealand Court of Appeal in *Hosking*, *supra* note 17.

224 For example, the Editor-in-Chief of the English newspaper the *Daily Mail*, Paul Dacre, responded to the judicial recognition of the misuse of private information tort (and par-

the task of creating law is one which has been rehearsed on many occasions. And yet the common law survives and prospers in Canada and across the common law world precisely because of the occasional "legislative" acts of judges which enable it to adapt to changing times. In *Jones*, Justice Sharpe's imaginative process evidences his recognition of the potential criticism that he faces. Moreover, it becomes clear from the analysis offered in this essay that the development that has taken place in *Jones* is defensible against such criticism. The category of tort recognized in *Jones* is novel in Canada, but the ideal of corrective justice—the underlying principle which demanded the recognition of intrusion upon seclusion—has a long and healthy lineage.

The recognition of a novel tort might be preferable to the evolution, by a process of "narrow" incremental development, of a more limited privacy tort. For in England, the process by which the equitable doctrine of confidence has morphed into the tort of misuse of private information has given rise to considerable uncertainty. For example, the need for a pre-existing relationship of confidence between the parties, which had been a long-standing feature of confidence law, was eventually read out of the cause of action.[225] Similarly, the original notion that the offending information must have a "quality of confidence" about it has been severely watered-down; today, even information which has entered the public domain may still attract the label "private".[226] Moreover, the recent Court of Ap-

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ticularly the judgment in *Mosley*, *supra* note 217) by launching a stinging attack on the High Court judge he considered to be its main proponent, Mr Justice Eady. He asserted that

> the British Press is having a privacy law imposed on it, ... allowing the corrupt and the crooked to sleep easily in their beds ... [and] undermining the ability of mass-circulation newspapers to sell newspapers in an ever more difficult market.
>
> The law is ... coming ... from the arrogant and amoral judgments ... of one man.
>
> I am referring, of course, to Justice David Eady who has, again and again, under the privacy clause of the Human Rights Act, found against newspapers and their age-old freedom to expose the moral shortcomings of those in high places (Paul Dacre, "Society of Editors: Paul Dacre's speech in full" (09 November 2008), online: Press Gazette <www.pressgazette.co.uk/node/42394>).

[225] "The law now affords protection to information in respect of which there is a reasonable expectation of privacy, even in circumstances where there is no pre-existing relationship giving rise of itself to an enforceable duty of confidence" (*Mosley*, *supra* note 217 at para 7).

[226] See e.g. *McKennitt v Ash*:

> [T]he protection of the law will not be withdrawn unless and until it is clear that a stage has been reached where there is no longer anything [pri-

peal ruling in *Tchenguiz* has questioned whether (as has previously been assumed) liability attaches to the *publication* of the offending information by the defendant, or whether it may in fact attach simply to its *acquisition*.[227] If this is so, then misuse of private information has the *potential* for significantly wider application than has previously been thought, but we can do little more than speculate as to how far this may stretch.[228] A person committed to the pursuit of legal certainty would have cause to regard this situation in English privacy law as thoroughly unsatisfactory.

By contrast, the terms in which Justice Sharpe has formulated the *Jones* tort of intrusion upon seclusion give rise to greater certainty. Moreover, in closely following the formulation of William Prosser's U.S. intrusion tort, future Canadian privacy cases will be able to draw upon a rich volume of authority from the United States regarding its operation. The only party who has really suffered from a lack of certainty is the defendant (Tsige) herself, who was held liable in novel circumstances. Yet she can have been in little doubt when illicitly accessing Jones' banking records that she was engaging in an "[obvious] social wrong".[229]

But Justice Sharpe's decision in *Jones* is not merely to be defended; it is surely to be welcomed. *Jones* may yet come to be seen as a seminal case in Canada and perhaps right across the common law world. It has been enthusiastically adopted by the New Zealand High Court in *C v. Holland* just eight months after the judgment in Ontario was released.[230] It is noteworthy that, in *Holland*, Justice Whata played down the notion of a

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> vate] left to be protected. For example, it does not necessarily follow that because personal information has been revealed impermissibly to one set of newspapers, or to readers within one jurisdiction, that there can be no further intrusion upon a claimant's privacy by further revelations ([2005] EWHC 3003 (QB) at para 81, [2006] EMLR 10 (Eady J)).

See also the recent decision of the High Court in *Rocknroll v News Group Newspapers Ltd* ([2013] EWHC 24 (Ch), 2013 WL 127878), where Briggs J restrained publication of photographs which had been publicly viewable on the claimant's Facebook page.

227 See *Tchenguiz*:

> If confidence applies to a defendant who adventitiously, but without authorisation, obtains information in respect of which he must have appreciated that the claimant had an expectation of privacy, it must, a fortiori, extend to a defendant who intentionally, and without authorisation, takes steps to obtain such information. ... [I]ntentionally obtaining such information, secretly and knowing that the claimant reasonably expects it to be private, is itself a breach of confidence. ... [L]ooking at documents which one knows to be confidential is itself capable of constituting an actionable wrong (*supra* note 27 at para 68).

228 See Bennett, *supra* note 180 at 572.

229 *Donoghue*, *supra* note 126 at 583.

230 *Holland*, *supra* note 32.

growing trend toward increased privacy protection, cautioning that "[a]cceptance [of an intrusion tort] in some parts of North America is not an international trend."[231] However, I might legitimately suggest that, given New Zealand's acceptance of such a tort and given the earlier *obiter* statements in the English case of *Tchenguiz*, evidence of such a trend is mounting.

The clarity offered by *Jones* contrasts starkly with the state of affairs in which English privacy jurisprudence currently finds itself. For we see in England a tendency, amid the academic community in particular, to get bogged down in matters of technical detail (for example, the "horizontal effect" debate) and to lose sight of some of the larger questions with which I have engaged.[232] The vast majority of this highly technical commentary has been of great quality and value. Yet there are reasons to suggest that this focus on matters of doctrinal detail has led to intellectual complacency, placing English privacy jurisprudence in a state of relative poverty compared with other fields of tortious inquiry (e.g. negligence).[233] For example, the seminal case of *Campbell*, and its subsequent line of authority, has been subjected to technical analysis almost *ad nauseam*.[234] But commentators have not undertaken a detailed examination of the extent to which corrective justice (and an appeal thereto) plays a role in recent developments in English law; nor have they sought to examine or understand the imaginative processes evident in these developments. Moreover, given that English law contains no equivalent of the living tree method of constitutional interpretation, the constraint upon the judiciary to develop the common law on a merely incremental basis has been attributed all the more importance. For example, Phillipson and Williams have recently highlighted the centrality of incrementalism to the judicial method under the *HRA*.[235] But the *nature* of the incrementalism involved in the development of English privacy law is not conclusively dealt with in their piece and has attracted regrettably little attention elsewhere.

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[231] *Ibid* at para 86.

[232] See notes 5 and 26, *supra*, and 234, *infra*, and accompanying text.

[233] For example, this essay has drawn extensively on analytical ideas expounded in Richard Mullender's work on negligence law, applying them to the field of privacy. Mullender's work on negligence forms part of a rich body of analytical offerings in that field, yet there is currently very little similar material focusing on privacy.

[234] See e.g. Moreham, "Privacy in the Common Law", *supra* note 93; Tanya Aplin, "The Development of the Action for Breach of Confidence in a Post-HRA Era" (2007) 1 IPQ 19; Alastair Wilson & Victoria Jones, "Photographs, Privacy and Public Places" (2007) 29:9 Eur IP Rev 357; Rebecca Moosavian, "Charting the Journey from Confidence to the New Methodology" (2012) 34:5 Eur IP Rev 324.

[235] See Phillipson & Williams, *supra* note 5.

A tendency toward obsessive focus on technical detail robs English privacy jurisprudence of the attention that ought to be paid to matters which invest it with politico-legal significance. More worryingly, it suggests that both the English judicial and academic communities have fallen into the trap of believing that new law flows simply from existing law, which is, at least, not solely the case. New law also flows from principle, amenable to change as society realizes more about itself. And so Canada and now also New Zealand have forged ahead in recognizing the new tort of intrusion upon seclusion, remembering that new law is moulded by principle. Meanwhile, English privacy law has been left behind, still failing to engage with these larger questions and thus appearing somewhat crabbed.

What is to be particularly welcomed about Justice Sharpe's judgment in *Jones* is the clarity that he has managed to bring to the task of developing a novel privacy tort. In staking out a clear position on the use of *Charter* values as a guide for common law development, giving a prominent role to the principle of corrective justice in the formulation of the new tort, and elucidating the incrementalism present in the decision, he has presented us with the opportunity to study the process underpinning the development of a novel head of liability in detail. I have been able to draw out discrete aspects of the judgment, postulating that a qualified deontological moral impulse triggered the exercise of legal imagination that in turn led Justice Sharpe to adopt the method upon which I have dwelt.

The analysis offered in this essay provides a framework for analyzing cases like *Jones* that may arise in future. If this is indeed the beginning of a global trend toward the more widespread adoption of intrusion-type torts, we can expect to see more cases of this sort in the near future. The framework offered here looks beyond matters of technical detail and draws out aspects of the judgment which are relevant to the large themes that invest privacy law with politico-legal significance: the process of incrementalism, the moral impulses at work within the law, and the relevance of imagination to the law's operation. *Jones* has placed Canada at the forefront of common law privacy development. It has afforded us a prime opportunity to engage with these themes, which will both require and deserve more judicial and academic work across the common law world if, as seems likely, new privacy torts continue to emerge.